JUSTICE AND ADMINISTRATIVE LAW

A STUDY OF THE BRITISH CONSTITUTION

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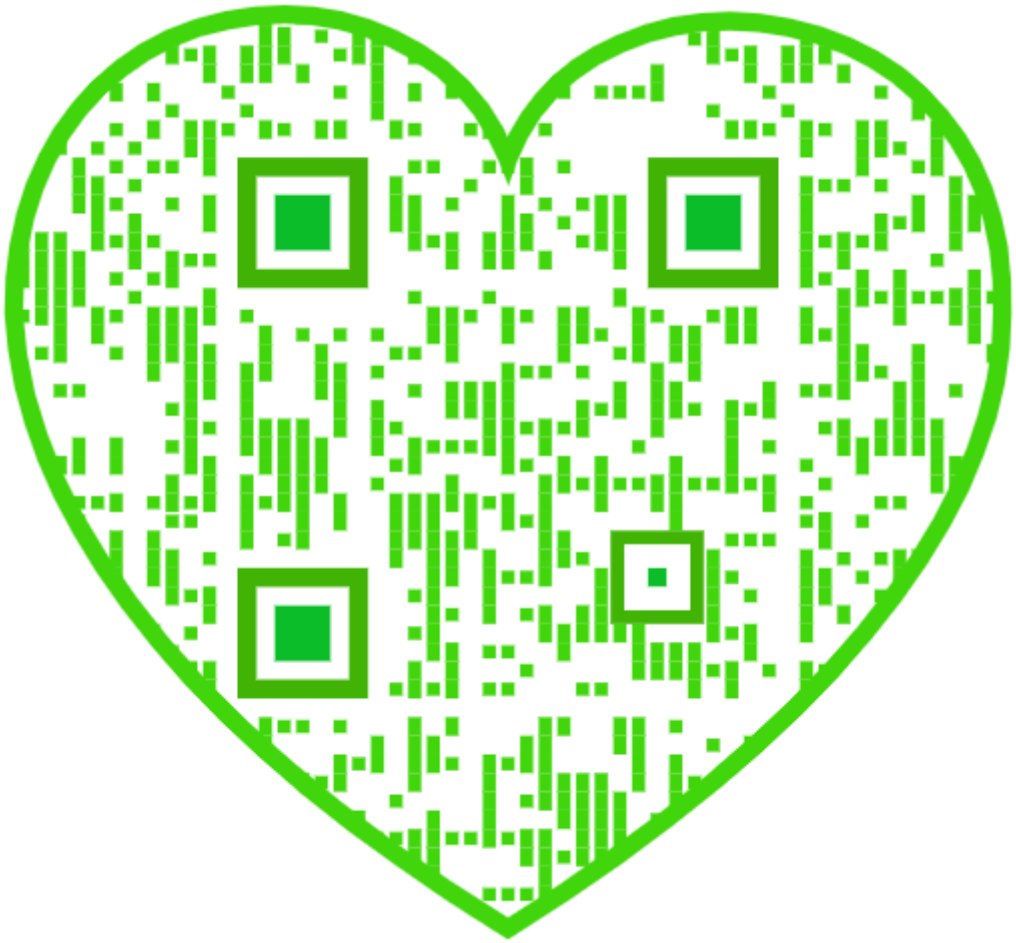

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"The period has been one of unprecedented intellectual progress. . . . We do not go about saying that there is another defeat for science, because its old ideas have been abandoned. We know that another step of scientific insight has been gained."

A. N. WHITEHEAD in
Science and the Modern World.

TO

GRAHAM WALLAS

CONTENTS

PAGE

INTRODUCTION xiii

CHAPTER I

ADMINISTRATIVE AND JUDICIAL POWER . . . 1
The Distribution of the Power to Decide . . 1
The Functions of Government 5
The Legendary Separation of Powers. . . 12
The Administrative Functions of Judges . . . 19
The Judicial Functions of Administrators . . 23
Administrative Law in England 26
The Hegemony of the Executive . . . 33
Conclusion 35

CHAPTER II

JUSTICE IN THE COURTS 40
Popular Notions of the Judicial Process . . . 40
The Independence of the Judge . . . 43
The Immunity of the Judge 50
The Responsibility of the Administrator . . . 55
The Integrity of the Judge 58
The Integrity of Administrators 64
The Judge must Act Personally 67
The *Lis Inter Partes* 69
The Right to be Heard 74
According to the Evidence 77
The Case in Hand 81
A Final Decision 82
Conclusion 87

CHAPTER III

PAGE

ADMINISTRATIVE TRIBUNALS 90
The Railway Courts 92
The Judicial Functions of the Minister of Health . . 101
The London Building Tribunal 107
The Judicial Powers of the District Auditor . . 109
National Health Insurance Tribunals. 111
Tribunals for Unemployment Insurance . . . 125
The Judicial Functions of the Board of Education . . 130
The Judicial Functions of the Board of Trade . . 133
The Judicial Functions of the Minister of Transport . 135
Pensions Tribunals 137
The Attitude of the Judicature . . . 139
The Arlidge Case 143
The Commission on Awards to Inventors . . 150
The Law Officers and Patent Appeals . . . 153
The War Compensation Court. 154
Conclusion 156

CHAPTER IV

DOMESTIC TRIBUNALS 161
Voluntary Associations 161
Their Judicial Functions 164
Their Organs of Justice 166
The Attitude of the Judicature 167
Natural Justice 169
Immunity from the Courts 172
Vocational Organisations 176
An Absence of Control 179
Conclusion 184

CHAPTER V

PAGE

THE JUDICIAL MIND 185

The Psychological Background 185

The Need for Consistency 189

The Need for Equality 195

The Need for Certainty. 200

The Rule of Reason 206

The Technique of Impartial Thought . . . 210

The Artificial Reason of the Law 215

The Exclusion of Imponderables 220

Judicial Discretion 228

The Good Judge 237

Conclusion 247

CHAPTER VI

TRIAL BY WHITEHALL: AN EVALUATION . . . 249

The Revival of Administrative Law 249

The Causes of its Growth 250

The Advantages of Administrative Tribunals . . 262

The Disadvantages of Administrative Tribunals . . 275

The Bogey of Political Interference 282

The Structure of Administrative Tribunals . . . 288

The Dangers of Administrative Law 298

The Regulation of Administrative Tribunals . . 304

The Control of Domestic Tribunals 310

Some Constructive Proposals 313

Conclusion 322

INDEX OF AUTHORS AND OTHER PERSONS . . 329

GENERAL INDEX 331

TABLE OF CASES 341

INTRODUCTION

ONE of the most striking developments in the British Constitution during the past half-century has been the acquisition of judicial power by the great departments of State and by various other bodies and persons outside the courts of law. These tribunals are not only unconnected with the courts of law, but are also for the most part outside their control. In many instances the judicature is specifically prohibited by statute from reviewing their decisions or from supervising their activities in any way.

This remarkable movement betokens the existence in the Constitution of Great Britain of a definite body of Administrative Law, or Executive Justice as it is sometimes called, and discloses a breakaway from that Rule of Law which the late Professor A. V. Dicey regarded as an essential feature of the English constitutional system. It has received little attention, either from Dicey or his followers, and for the most part has been passed by unnoticed save for a word here and there in works devoted to other subjects or a protest directed against some particular example. Yet it is obviously a matter of very considerable importance in the government of this country. There is still, it is true, nothing comparable to the system of *droit administratif* which obtains

in France and elsewhere; but that need not blind us to the fact that there exists in England a definite and extensive body of administrative law or executive justice which in its own sphere is no less significant.

The aim of this book is to examine in detail the nature and scope of the judicial functions exercised by government departments and other public and private bodies; to analyse the causes which have led to such power being conferred on informal tribunals of this kind; and to evaluate the advantages and disadvantages which result therefrom. No attempt has been made to deal with such topics as the protection of the Crown from actions for tort, the special immunity conferred on public authorities by certain statutes, and other matters of a similar character, as they do not properly belong to the main subject under discussion, and have no real relevance thereto.

An endeavour has been made to deal with the subject from a wider point of view than the purely legal one. The most fertile field of investigation in the social sciences appears to be presented by the ground which lies between law, economics, political science and psychology, a territory which so far has been almost unexplored. In the present work, which deals primarily with Constitutional Law, it has been found necessary to make considerable excursions into the realms of psychology and political science. The judicial process cannot be understood merely by reference to judicial institutions. Indeed, the element which we value most highly in our judicial system is something which is based less on external organisation than on mental

processes. What I have been concerned with in the main has been to discover what are the essential conditions, psychological as well as institutional, which must be fulfilled if the ends of justice are to be served, rather than to pay tribute to any particular form of judicial organisation or structure. That being so, I have not approached the study of administrative justice with any ready-made assumption that every tribunal which does not at the moment form part of the recognised system of judicature must necessarily and inevitably be arbitrary, incompetent, unsatisfactory, injurious to the freedom of the citizen and to the welfare of society. Such an attitude would betoken the narrowest type of legalism. I have attempted rather to understand the reasons which have led to the setting up of these Administrative Tribunals, to comprehend what services it was felt they could render beyond the power of the courts of law, and to ascertain whether they in fact perform their functions in a satisfactory manner.

There can be no doubt that the rise of Administrative Law is mainly due to the vast extension in the work of government which has taken place in England during the past few decades, and to the rapid increase in power of the executive which has accompanied that extension. The traditional court system, in which isolated individuals contest disputed rights of property or person, has been superseded by an entirely new type of judicial process so far as concerns controversies arising in connection with the great new social services undertaken by the State. Executive justice, far from being a temporary and accidental intrusion into the

mellowed sanctity of the British Constitution, is inherently connected with modern social evolution and is a feature of the governmental order likely to grow extensively during the present century. Administrative Tribunals will, I venture to predict, become of increasing importance as adjudicating bodies in disputes concerning a large number of economic and social affairs. I therefore suggest that it behoves us to pay careful attention to a movement which has already assumed considerable proportions. If we are to have a body of Administrative Law, it should at least be a good one. So much will be conceded by even the most active opponents of constitutional change. I have myself gone further than mere description and have sought to discover what principles, if any, should go to the making of a sound body of Administrative Law. The reader will find a number of recommendations intended to be of practical value at the end of the book.

So rapid is the development of Administrative Justice at the present time, that even as this book goes to press various changes in the existing body of Administrative Law are either adumbrated or actually in course of taking place. Let me say, therefore, that although this work is based on a mass of detailed observation which, it is hoped, was accurate at the time when it was made, I have in the main been more fundamentally concerned with prevailing tendencies than with the exact detailed position existing at any given moment, more interested in the underlying substance than with the changing content. Hence I venture to believe that relatively slight variations in the actual phenomena

will not vitally affect the general principles which I have ventured tentatively to suggest.

My obligations to various writers will be apparent from the text. Two articles on " The Appellate Jurisdiction of Central Government Departments " by Mr. F. H. C. Wiltshire, the Town Clerk of Birmingham, and Dr. I. G. Gibbon, Principal Assistant Secretary of the Ministry of Health, appearing in the *Journal of Public Administration* (October 1924), I found particularly useful and suggestive. To my friend Mr. Michael Heseltine, C.B., also of the Ministry of Health, I am heavily indebted for personal discussion which threw valuable light on many matters in which both he and I are interested as private citizens, and for his kindness in reading the proofs. I have also to acknowledge the great kindness of various friends at the London School of Economics and Political Science, that unique centre of stimulus and learning whose child I am. In particular, I have to thank Rt. Hon. Sidney Webb, M.P., Professor Edward Jenks and Professor H. J. Laski, who were good enough to read the manuscript and make valuable suggestions. To my cousin, Dr. Charles Singer, I am also indebted for a similar service. Mr. C. W. Ringrose, of Lincoln's Inn Library, was good enough to undertake the preparation of the index and table of cases.

I cannot conclude this acknowledgment of those who have helped me without paying a tribute to the work of some of the distinguished jurists and judges whose brilliant writings the United States of America is giving to the world. I have in mind

particularly Dean Roscoe Pound's *Spirit of the Common Law*, Mr. Justice Cardozo's *Nature of the Judicial Process*, Mr. Gerrard Henderson's *Federal Trade Commission*, and the works of President Frank J. Goodnow of Johns Hopkins University, and Professor Freund of the University of Chicago. I believe that no more brilliant literature concerning the problems of law in relation to modern life is to be found than that which is emerging from the constellation of theoretical jurists and practising lawyers who dwell across the Atlantic and whose work enriches not merely their own country but the whole civilised world.

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CHAPTER I

ADMINISTRATIVE AND JUDICIAL POWER

The Distribution of the Power to Decide — The Functions of Government — The Legendary Separation of Powers — The Administrative Functions of Judges — The Judicial Functions of Administrators — Administrative Law in England — The Hegemony of the Executive — Conclusion.

THE DISTRIBUTION OF THE POWER TO DECIDE

THE enormous number of decisions which are made each day by every normal adult member of the human race revolve around an infinite diversity of subjects and present an immense variety of type and method of generation. The one essential feature common to them all is the fact that they represent a choice made between what appear to be available alternatives, a resolution arrived at to adopt or pursue a certain course, the selection of a particular path. As society develops and life becomes more highly organised, the field of possible alternatives extends ; and the matters which have to be decided increase not only in number but in complexity. Often a kind of interlocking mesh of decisions can be seen to exist. An agricultural labourer may decide to send his son to be a skilled engineer ; but whether the boy is able to earn his living in that occupation, or even enter it, will depend on a whole

series of decisions made by capitalists and managers and trade union officials and investors and consumers, not one of whom may be known to him personally, concerning the kind and quantity of commodities they are willing or able to produce and consume, and the particular manner in which the industry shall be organised.

Civilisation has in all ages required that the power to decide certain classes of questions should be placed in the hands of recognised public authorities whose decisions should be enforced. This is the basis of all government. The distribution of power in this manner has, throughout history, been maintained sometimes by the consent of those subjected to its sway, sometimes by the might of arms; more often by a mixture of both. With the growth of Western civilisation the idea has developed, although it has not always been applied, that the public welfare should be the dominant consideration affecting the persons or groups to whom the power of deciding and enforcing certain questions has been entrusted or by whom it has been grasped.

It is the removal in this way of certain matters from the domain of private interest, private desire, and private action to the realm of disinterested control in the common weal that is connoted by such phrases as "the reign of law" and so forth. For ultimately there can be no reign of law without the supersession of private decision and a submission to the judgment of recognised authorities, whether executive, judicial, or legislative. Controversy often runs high nowadays as to exactly what matters should be so dealt with; but behind the controversy lies a solid basis of agreement (from which the

Anarchist alone dissents) that at any rate certain affairs fundamental to the life of society should be so treated. Not even the last surviving believer in *laissez faire* would now propose that the task of deciding whether a man had committed a crime and of determining the suitable punishment should be left to the unfettered decision of the individual directly injured thereby. The business of keeping the peace is an industry which everyone agrees should be nationalised.

The maintenance of security against aggression from without, and the keeping of the peace between man and man within the realm are historically the first functions of government; but, as society has developed, those functions have gradually extended from one sphere of activity to another, until we find ourselves confronted with that mass of regulation and interference on the part of the governing authority which is the special mark of the twentieth century industrial State. A public authority of one kind or another has now been set up in the public interest to decide, not only whether a man suspected of murder actually committed the crime or not, or how the military and naval forces of the country shall be disposed, but also such questions as what antiquities shall be purchased out of public money for the British Museum, what individuals shall be permitted to vivisect animals, what hours of overtime women in factories shall be allowed to work, and so on *ad infinitum*. The power to decide these and countless other questions has nowadays been given to individuals or groups of individuals who have been elected or appointed to public offices of one kind or another.

Behind the power to decide possessed by these governing authorities there lies the power to enforce the decision, if necessary by means of the organised force of the community.

It is obvious that civilised society could not continue to exist for very long if the affairs whose determination lies in the hands of public authorities were decided by individuals who relied solely on their instincts, or on the haphazard intuitive impulse of the moment. From early times men have demanded that certain kinds of questions should be decided by a process which was comparatively regular, stable, certain, more or less consistent, and from which self-interest and emotion were as far as possible eliminated. It was in regard to the punishment of crime and the settlement of disputes involving violence that this process was first applied; and it is therefore in this field that the judicial function makes its earliest appearance. The most definite popular notion of a judicial proceeding is still the trial of a man for a grave breach of the peace, such as murder. The scarlet robes of the judge, the haggard face of the prisoner, the easily followed story of passion or revenge, with its dramatic culmination and simple motives, the relentless cross-examination of the female witnesses—this is the sort of image, replete with picturesque circumstance and morbid detail, which for centuries has appealed to the man in the street as representing the very quintessence of all that is "judicial".

THE FUNCTIONS OF GOVERNMENT

But the business of trying criminals, and, indeed, the entire work of the judiciary in settling disputed questions, is only one of the functions of government, and possibly not even the earliest at that. There is also, as everyone knows, the business of legislation, or law-making, and that of administration, or the regulation of public affairs and the conduct of public services. To attempt to describe the intricate system of government which exists in a modern State in terms of this simple trinity of powers is to run the danger of reducing a complex truth to a simple falsehood; but though the classic formula is profoundly unsatisfactory, it is difficult to find a series of categories which is more comprehensive. Nevertheless, it is probably the fact that some functions of government are not capable of classification into legislative, executive and judicial powers.

It is very difficult to discover any adequate method by which, in a highly developed country like England, judicial functions can be clearly distinguished from administrative functions. Mere names are of no avail, for, as we shall see, judges often administer, and administrators often judge. It is easy enough to take a typical example of each kind of function, and to identify it as belonging to a particular category. But that does not get us out of the difficulty, unless we can extract from it some characteristics essential to its nature. A further difficulty arises from the fact that many of the features which once belonged

almost exclusively to activities that were carried on only in courts of law, are now to be observed as attaching also, to a greater or less extent, to activities carried on by other departments of government. Furthermore, what we may call the judicial attitude of mind has spread from the courts of law, wherein it originated, to many other fields, with the result that an increasingly large number of governmental activities bear the marks of both the administrative process *and* the judicial process, and cannot be distinguished by any simple test. "The changing combinations of events will beat upon the walls of ancient categories", a distinguished American judge has observed; and that is precisely what has occurred in the classification of governmental functions in England.

The lawyers, of course, have often had to decide, in practical cases arising in the courts, whether a particular activity was of a judicial or an administrative (or "ministerial") character; and important consequences have flowed from their decisions.[1] But those decisions disclose no coherent principle, and the reported cases throw no light on the question from the wider point of view from which we are now discussing it save to demonstrate, by the very confusion of thought which they present, the difficulty of arriving at a clear basis of distinction. Guardians of the Poor, for example, in determining to grant superannuation to the master

[1] The writs of prohibition and *certiorari* will lie only in respect of judicial acts, and not for those of an administrative or "ministerial" character. Many of the cases have turned on whether one or other of these ancient writs would issue in respect of the act complained of, in order to subject the matter to the scrutiny of the court. See G. Stuart Robertson: *Civil Proceedings by and against the Crown*; Short and Mellor: *Practice of the Crown Office*.

of a workhouse, and the Local Government Board, in giving their consent, were held in law to have acted in a judicial capacity, on the ground that they were deciding a question of right and that their decision imposed a pecuniary liability on the rate-payers.[1] In another case in which the Local Government Board for Ireland was concerned, an Order constituting a district in Ireland a township was treated as being a judicial act because the determination of the boundaries of the proposed town involved taxation and a code of local laws to those living within the prescribed limits.[2] The action of a Chief Gas Examiner appointed by the London County Council, in affirming a report made by one of his assistants concerning the deficiency of illuminating power in the gas supplied by a producing company, was held to be a judicial act on the ground that the report was "virtually a judgment, being final (by statute) and the basis for future proceeding".[3] In another case the duties of the Minister of Labour, in deciding under statutory authority various questions relating to Unemployment Insurance, were held to be judicial on the basis that the questions referred to were either questions of law or questions of fact and "their determination involves no element of discretion".[4] In one important case which came before the House of Lords, Lord Herschell expressed the opinion that in view of the fact that an objector who opposes the grant

[1] Rex (Bryson) *v* Lisnaskea Poor Law Guardians (1918), 2 I.R., p. 258.

[2] The Queen (Dixon) *v.* Local Government Board (1878), 2 L.R.Ir., p. 316.

[3] The Queen *v.* L C.C. (1895), 11 T.L.R., p. 337.

[4] Society of Accountants in Edinburgh *v.* Lord Advocate (1924), W.C. and Ins. Rep., p. 285.

of a liquor licence by justices sitting as a confirming authority is expressly made a party to litigation by statute, the latter proceedings are *therefore* judicial, for there is a *lis inter partes*.[1]

No less diverse and inconsistent, on the other hand, have been the grounds on which the courts have decided that certain types of activity are of an administrative character. Thus, in a leading case decided in the middle of the eighteenth century, the issue of a warrant by a justice of the peace ordering a constable to deliver up to certain persons a horse that had been seized, was held to be a "ministerial" act because the justice had no choice in the matter.[2] Eighty years later the issue of a distress warrant to levy the poor rate was held to be an administrative act, and the court suggested that this ruling applied to warrants of every kind, because they are not conclusive proof of any of the facts stated in them.[3] In a later case concerning a certificate of innocence which magistrates were required by statute to issue to persons improperly charged with committing an assault or battery, the lack of discretion available to the magistrates, as to whether or not they would issue the certificate, was again made the reason for regarding their action as administrative.[4] In 1884, in another case concerning the issue of a distress warrant for the poor rate, Lord Brett, M.R., speaking of the action of the justices of the peace, said their act was a ministerial

[1] Boulter *v.* Kent Justices (1897), A.C, p. 569; R. *v.* Manchester Justices (1899), 1 Q B., p. 571; R. *v.* Sharman (1898), 1 Q.B., p. 578.

[2] Rex *v.* Lediard (1751): Sayer's Reports, p. 6.

[3] *Ex parte* Taunton (1833), Dowling's Reports on Points of Practice, p. 55.

[4] Hancock *v.* Somes (1859); Ellis *v.* Ellis, Rep., vol. i. p. 795.

one because "there was nothing which entitled them to do anything but issue it".[1] No other judge had gone so far in identifying administrative acts with an absence of discretion. But at the beginning of the present century, Lord Alverstone, C.J., in deciding that an appointment by justices of a clerk is not a judicial act, observed that "the fact that justices have to exercise their discretion is not the test whether the act is judicial or not"—a statement which was clearly inconsistent with the earlier decisions.[2]

In Ireland the judges had for many years been basing their opinions on other grounds. Thus, an enquiry by the Local Government Board as to the wisdom or propriety of making a Provisional Order concerning the water supply of an Irish town was held to be an administrative act. The Board was not acting judicially, because a Provisional Order is not valid in itself, and does not impose an obligation on anyone, and thus it is "not a 'determination' sufficient to erect into a court the body empowered to make it"—a somewhat circular argument which results in placing the court before the case.[3] In another Irish case the examination by a district auditor of the accounts of a Poor Law Union was held to be an administrative proceeding, on the ground that the auditor's certificate is not a conclusive declaration that the accounts are in order, which finally determines the matter once and for all.[4] In an English case which followed shortly

[1] R. *v.* Marsham (1883), 50 L.T.R , p 142.

[2] R. *v.* Drummond (1903), 88 L.T.R., p. 833.

[3] *In re* L.G.B. *ex parte* Kingstown Commissioners, 16 L.R.Ir., p. 150.

[4] The Queen *v.* Guardians of the Omagh Union, 26 L.R Ir., p 619, at p. 625.

afterwards Mr. Scrutton (now Lord Justice Scrutton) argued that the Watermen's Company on the river Thames, in hearing applications for licences from men desirous to act as watermen or lightermen, are acting administratively, and not judicially, because "they have no power to administer an oath".[1]

It is obvious from these examples—and they are fair specimens—that the decisions of the courts as to which functions are judicial and which are administrative have not proceeded on any consistent principle; and we cannot look therefore to the recorded cases for any real assistance in distinguishing judicial from administrative power.

In the United States of America confusion is even worse confounded. In the States of Alabama, Massachusetts and Michigan, for example, the courts have held that the action of Commissioners of Highways or of a City Council in laying out highways and streets is judicial. In Maine and New Hampshire, on the other hand, this same act has been regarded as being of a non-judicial character when performed by the Selectmen of a town, but *is* judicial when done by a Court of Sessions or a County Court. Thus the determining factor here is the nature of the body performing the function; and an act which is of an administrative character if done by one authority is "metamorphosed into a judicial act" when done by another.[2]

There does not appear to be any conclusive test by means of which judicial activities can be in-

[1] R. *v.* Waterman's Company (1897) 1 Q.B., p. 659. This case is not well reported.

[2] Frank J. Goodnow: "The Writ of Certiorari", 6 *Political Science Quarterly*, pp. 507-510; cf. People *v.* Mayor, 5 Barb., p. 43.

fallibly distinguished from administrative activities, very largely because there is no sharp dividing line between the two. Judicial administration, as Sir Josiah Stamp points out, is merely a specialised form of general administration which "has acquired an air of detachment". Some judicial administration is still in process of acquiring the air of detachment; and not a little more is still embedded, as it were, in the original clay of general administration. Both administrative and judicial powers can, however, be projected on to a common plane of governmental authority. At one end of the scale judges are making certain decisions under conditions and by methods which we can clearly recognise as being of a judicial character. At the other end of the scale public officers are performing certain other acts which are marked by equally distinct features of their own; and these we can call administrative functions. Both extremes are situated on the same plane, as it were; and midway between them is a large and important territory which is occupied by a great mass of governmental bodies which, though not judicial in name or outward appearance, are nevertheless discharging functions of a judicial nature. These we may call Administrative Tribunals.

Farther down the scale we find yet another series of authorities exercising a jurisdiction over a whole mass of controversial matters relating to the membership of clubs, friendly societies, trade unions and professional associations. These we may call Domestic Tribunals. They also, we shall find, perform duties which partake to a marked degree of the nature of judicial functions, though they do

not possess all the features which we expect to find in a formal court of justice.

With so delicately graded a scale of authorities it is scarcely surprising if we find it difficult to discover an infallible test which shall immediately tell us which functions are judicial and which administrative. It is, however, necessary for practical purposes to have some kind of a classification; and we may accordingly suggest that the primary characteristics of "pure" judicial functions, by whomsoever exercised, are:

(1) The power to hear and determine a controversy.

(2) The power to make a binding decision (sometimes subject to appeal) which may affect the person or property or other rights of the parties involved in the dispute.

Administrative functions, on the other hand, consist of those activities which are directed towards the regulation and supervision of public affairs and the initiation and maintenance of the public services.

THE LEGENDARY SEPARATION OF POWERS

While we accept, subject to the foregoing qualifications, the three powers of administration, legislation and judicature as designating somewhat imperfectly the various functions of government, it does not by any means follow that we must consign ourselves to that antique and rickety chariot known as the Separation of Powers, so long the favourite vehicle of writers on political science and constitutional law for the conveyance of fallacious ideas.

The doctrine of the Separation of Powers is

stated in Halsbury's *Laws of England*[1] as follows: "The sovereign power, or government of the country, comprises the legislature, or body which makes the laws, the executive, or authority which carries the laws into effect so far as they relate to the public services, and the judiciary, which enforces the due observance of the law".

In a very recent book entitled *The Mechanism of the Modern State*, Sir John Marriott, M.P. for York and a lecturer in political subjects at Oxford, observes that "To-day, in all civilised states, the three functions of government are clearly distinguished, and each function is assigned to its appropriate organ". After describing the functions of government and the "appropriate organs" in the conventional way, he then remarks that "the principle of the separation of powers being then generally admitted", and the differentiation of function having been largely carried out, all that remains is to consider in further details the various problems which arise in connection with the legislative, the executive and the judiciary.[2]

The division of powers enunciated in this theory, and their allocation to separate branches of the government has, at no period of history, borne a close relation to the actual grouping of authority under the system of government obtaining in England; but the conception has nevertheless exerted a great influence in confusing the minds of men both at home and abroad. Nowhere has this

[1] Vol. vi. p 317. See also F. J. Goodnow: *Comparative Administrative Law*, vol. i. pp. 22-23.

[2] Vol. i pp. 386-387. See also J. A. R. Marriott: *English Political Institutions* (2nd ed.), p. 43, for an expression of similar views by the same author.

been more clearly demonstrated than in the United States. In America, owing to the adoption of written constitutions and to the inclusion in them of the doctrine of the separation of powers to its full extent, "it has been a fundamental principle that every governmental function or power can and must be classified as either executive, legislative, or judicial, must be assigned to its proper department and be exercised there, and that any attempt to give it to a different department, or to mingle powers belonging to two or more departments . . . is unconstitutional and void".[1] Such a rigid separation of governmental functions has, it is admitted, proved "impracticable".

And "impracticable" indeed such a separation has proved throughout English history. We are not here dealing with legislative functions; but so far as administrative and judicial activities are concerned the stony path of past events is as merciless to the fatigued doctrine of the separation of powers as are the facts of the present. The very word "court", which to-day we associate so closely with the administration of justice, signifies etymologically the king's palace or residence, a place which was primarily the seat of executive power.[2] Before the end of the twelfth century the King's Court had become the dominant governing

[1] "Administrative Tribunals" by Warren Pillsbury, 36 *Harvard Law Review*, p. 405. An example of this is to be found in the Constitution of the State of California, which lays it down that "The powers of the government of the State of California shall be divided into three separate departments—the legislative, executive, and judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others" (Art. iii. sec. i.). See also H. J. Laski: *Grammar of Politics*, p. 295.

[2] Jacob: *Law Dictionary*; Halsbury, ix. p. 8.

authority in England. It consisted of a highly organised body of trained officials who toured the country, returning to the king's headquarters after each visitation. This court was financial, administrative and judicial.[1]

By the end of the mediaeval period the King's Council was coming to be regarded mainly as an administrative body. "But as yet", Professor Holdsworth observes, "the boundaries between executive functions on the one hand and judicial and legislative functions on the other, were very indistinct."[2] Gradually, under the pressure of the large amount of judicial work which was placed on the Council, it began to split into two parts—a judicial court and an administrative council. The growth of our judicial system may thus be regarded historically as the transference to parts of the King's Council of judicial powers originally exercised by the king in council[3] and intermingled with other functions.

In the sixteenth century the Common Law Courts began to wane before the fierce challenge of the executive part of the King's Council. Lawyers began to complain, Dean Pound tells us, that the Common Law was being set aside. Little important business came to the King's Courts of Law. The living law shifted to the King's Council, in the Star Chamber, in the Court of Requests, and in the Court of Chancery—all of them at that time what we should now call Administrative Tribunals. "It seemed that judicial justice, administered in courts,

[1] E. Jenks: *Law and Politics in the Middle Ages*, p 38.

[2] W. S. Holdsworth: *History of English Law*, vol. i. pp. 478-479; F. A. Inderwick: *The King's Peace*, pp. 50, 51, 70, 91.

[3] A. V. Dicey: *Law of the Constitution* (8th ed.), p. 371.

was to be superseded by executive justice administered in administrative tribunals or by administrative officers." [1] In the sixteenth century, as in the twelfth, it was clearly impossible to draw a line between judicial and administrative functions.[2]

The seventeenth century witnessed the ascendancy of the justice of the peace. The small group of country gentlemen who were appointed to keep the peace and to arrest wrongdoers gradually acquired an extraordinary collection of judicial and administrative duties which Maitland thought no theorist would attempt to classify, since their rich variety was "not the outcome of theory, but of experience".[3] The justices themselves certainly made no attempt at classification. In the Justices' Court of Sessions, Mr. and Mrs. Webb point out, "neither the individual magistrate nor the Divisional Sessions made any distinction between (1) a judicial decision as to the criminality of the past conduct of particular individuals; (2) an administrative order to be obeyed by officials; and (3) a legislative resolution enunciating a new rule of conduct to be observed by all concerned. All alike were, in theory, judicial acts. Though many of the orders were plainly discretional, and determined only by the justice's views of social expediency, they were all assumed to be based upon evidence of fact, and done in strict accordance with law." [4] Not only were the duties of the local justice miscel-

[1] Roscoe Pound: *Spirit of the Common Law*, p. 73.

[2] Cf. Holdsworth: *History of English Law*, vol. i. p. 502.

[3] F. W. Maitland: "The Shallows and Silences of Real Life", *Collected Papers*, vol. i. p. 470.

[4] Sidney and Beatrice Webb: *English Local Government—The Parish and the County*, p. 419. See also their *English Poor Law History*, part i. p. 89.

laneous in character, but the business of the royal judges themselves included a considerable amount of administrative work. It was part of their duty when on Assize, particularly during the first half of the seventeenth century, to supervise the local justices in carrying out the directions of the Privy Council, and to enforce the authority of the Council in administrative affairs by the issue of peremptory orders when necessary.[1] There was, in fact, no distinction drawn between judicial and administrative business, and the King's Bench controlled the administration of government as well as that of justice.[2] Dr. Gibbon, giving evidence recently on behalf of the Ministry of Health before the Royal Commission on Local Government, observed that "the mixture of administrative and the judicial was characteristic of English local government right down to the nineteenth century". The justices exercised both functions, and it would have been difficult at times to distinguish between them.[3]

This mingling of administrative and judicial powers in a single authority arose quite naturally as a matter of convenience. Save when it gave rise to notorious tyranny, as in the case of the Star Chamber, it evoked no comment and drew forth no protestation. The great majority of citizens were, indeed, unconscious that there was any lack of constitutional neatness and logical order in the prevailing governmental arrangements; for until

[1] S. and B. Webb: *History of Liquor Licensing in England*, p. 12.

[2] Frank J. Goodnow: "Certiorari", 6 *Political Science Quarterly*, p. 498.

[3] Royal Commission on Local Government, 1923, Minutes of Evidence, part i., M. 39, p. 20.

Montesquieu misread the English system in that most famous chapter of his *Esprit des Lois* (Book XI. chap. vi.), the divine right of powers to be separated had hardly been asserted. What had actually happened was that in early times all the functions of government, whether legislative, administrative or judicial, had resided in an almost undifferentiated form in certain authorities. Then gradually the settlement of disputes (and we must remember that in English law this includes criminal trials, which take the form of a controversy between individuals) was handed over to be decided by certain high officers called judges, and a characteristic formal procedure for dealing with these affairs was elaborated side by side with the evolution of certain legal doctrines and methods of thought. Of the principles underlying this development and the psychological processes which accompanied it, we shall have more to say hereafter. What we are concerned to point out now is that the separation of administrative from judicial functions never even approached completeness. In some cases an officer who was primarily an administrator would, in the course of time, gradually acquire judicial duties, as in the case of the sheriff[1]; in others it was the judge who was turned administrator, as in the case of the justice of the peace. Sometimes the administrative and judicial functions of an office have been so inextricably blended that it is wellnigh

[1] Francis Bacon: *Law Tracts*, p. 190: "Office of Constable. Every shire hath its sheriff . . . : his function or office is twofold: (1) Ministerial, (2) Judicial. As touching his ministerial office, he is the minister and executioner of all the process and precepts of the courts of law. . . . As touching his judicial office, he hath authority to hold two separate courts of distinct nature . . . wherein he doth enquire of all offences perpetrated against the common law. . . ."

impossible to say which capacity is the dominant one. The work of the coroner, for example, who holds the most ancient royal office in England, is, according to Blackstone "either judicial or ministerial; but principally judicial".[1] In the ordinary work of enquiring into the circumstances where people appear to have suffered a violent or unnatural death, the coroner sits as a court with a jury, and in law performs judicial functions by judicial methods; but he also possesses administrative authority to act as the *locum tenens* of the sheriff in certain events. The returning officer, again, who is responsible for the conduct of Parliamentary elections is to some extent an administrative official, "but he is not so to all intents and purposes", as Lord Abbott, Chief Justice, observed in one case; "neither is he wholly a judicial officer, his duties are neither entirely ministerial nor wholly judicial, they are of a mixt nature".[2]

THE ADMINISTRATIVE FUNCTIONS OF JUDGES

When we come to the present day, we find a mingling of functions more extensive than any that has existed since the sixteenth and early seventeenth centuries. Consider, for example, a few of the administrative functions of judges.

An obvious and important example of a high judicial officer who is almost daily responsible for the execution of administrative acts is the Lord

[1] Blackstone: *Commentaries* (8th ed.), I., ch. ix. (II.), p. 348. See also Sir E. Troup: *The Home Office*, p. 91.

[2] Cullen *v.* Morris (1819), 2 Stark, N.P.C, p. 577; Abbott, L.C J., at p. 587. Cf. Ackers *v.* Howard (1886), 16 Q.B.D., p. 739; The Queen *v.* Collins (1876), 2 Q.B.D., p. 30.

High Chancellor of England. The Lord Chancellor for the time being sits as the presiding judge in the highest court in Great Britain, the House of Lords; as a member of the Cabinet he participates in, and shares responsibility for, the entire executive action of the government of the day, and may assist in drafting its bills; while as head of the formal judicial system of the country he performs a vast number of administrative acts, such as appointing the County Court judges, and the masters and clerks of all the courts.[1] He also disposes of many Church livings to Anglican clergymen.

This blending of function in the person of a single office-holder is not confined to the Lord Chancellor, but extends to all the puisne judges of the High Court. For example, the jurisdiction of a judge when dealing with wards of court or lunatics is "parental and administrative",[2] and the court sits primarily to guard the interests of the ward or the lunatic. The disposal of controverted questions is only incidental and may not be involved at all. Thus, a considerable part of the jurisdiction of the court over a lunatic is concerned with authorising the sale, charging, mortgaging or disposal of the property belonging to the lunatic for the purpose of discharging debts or providing for his upkeep,[3] and these and many other cognate acts are obviously of an administrative nature.

The powers of a High Court judge over a ward

[1] Report of the Machinery of Government Committee, Cd. 9230/1918, p. 63 *et seq.* The Lord Chancellor acts also in a legislative capacity, but an examination of that part of his work is outside the scope of the present work.

[2] Scott *v.* Scott (1913), A.C., p. 417; Haldane, L.C., at p. 437.

[3] Lunacy Act, 1890, sec. 117; Rules in Lunacy, 1892, R. 123; Archbold's *Lunacy* (5th ed.), p. 147.

of court are even more varied and in many respects more extensive than are his powers over lunatics.[1] Thus, the education and upbringing of a child who is a ward of court are under the direct control of the court, and the guardian must apply to the judge in chambers from time to time for directions.[2] The court will decide in what religion a ward ought to be brought up, and whether the guardian may change even his own religion without being removed from the guardianship. It is obvious that a judge, in deciding whether it is for "the benefit of the infant" that he should be brought up as a Protestant, rather than as a Roman Catholic, is performing an administrative act, even though his decision is based on such objective facts as the religion of the parents.[3] The court, again, exercises complete authority over the marriage of a ward of the court. A ward may not marry without the consent of the judge; and to do so is contempt of court on the part, not only of the ward, but of the other party to the marriage and anyone who connives or assists at bringing about the marriage. Imprisonment is a recognised punishment for contempt of this kind, and committal for this offence takes place to this very day.[4] In the past, successive judges have declared certain marriages to be unsuitable,[5] and in particular those in which there is a considerable inequality of age, rank and fortune between the ward and the person whom he or she intends to marry or has in fact married; but it is

[1] Simpson: *The Law of Infants* (3rd ed.), p. 208; Halsbury's *Laws of England*, vol. xvii. pp. 146-149.

[2] Simpson: *op. cit.* p 365.

[3] F *v.* F. (1902), 1 Ch., p. 688.

[4] *In re* H.'s Settlement, H. *v.* H. (1909), 2 Ch, p. 260.

[5] Simpson: *op. cit.* p. 275. See cases cited therein.

difficult to feel that the function of the judge in consenting to a marriage is substantially an act of a more judicial nature, in the ordinary sense of the word, than is that of the natural parent, whose place he has taken, when engaged in a similar task. This part of the work of a judge is, in fact, entirely administrative in character, though he may bring to bear on it a particular attitude of mind derived from his judicial experience.

Passing from the judges of the High Court to the judges of the inferior courts we can see that although the work of the justices of the peace is now in the main judicial, certain duties of an administrative nature have still to be carried out by those who comprise the little army of what have for long been called " the great unpaid ".

The development of local government in England during the nineteenth century led to a great curtailment of the administrative work which, during the preceding two centuries, had fallen into the hands of the justices. The coming of the industrial revolution, which resulted in the haphazard massing of huge numbers of men, women, and children in towns almost entirely unprovided with what we regard to-day as essential services, gave rise to a series of new local government problems which the justices were wholly unfitted to solve. The need for adequate sanitary, police, highway and education services led to the reform of the old Municipal Boroughs and to the establishment, at first of special *ad hoc* bodies such as the local Boards of Health and the Highway Authorities, and later to the setting up of the new general local authorities, such as the District Councils and the Parish and

County Councils. This development resulted in most of the administrative duties of the justices of the peace being transferred to the new and more democratically appointed bodies.[1]

In connection with two important matters the justices were able, however, to retain some measure of their old administrative authority. One of these is the county police, which is to-day controlled by a Joint Standing Committee consisting of equal numbers of county justices and county councillors. The other matter is the issue of liquor licences. No new administrative duties have been given to borough justices since 1835, or to the county justices since 1888, save in regard to licensing matters, in which their powers were extended in recent times to cover music, dancing, and cinematograph shows.[2]

So much, then, for some examples of the administrative functions of judges. No less abundant are the judicial functions of administrators.

THE JUDICIAL FUNCTIONS OF ADMINISTRATORS

Before 1908 there was no means of reviewing judicially the verdict or sentence of a criminal court. The only way of rectifying injustice was by the grant of a pardon to the convicted person.

[1] See, for example, Local Government Act, 1888, sec. 3. According to Dr. Gibbon, the official witness of the Ministry of Health, the establishment of representative bodies for local government in the nineteenth century for the first time drew a line of demarcation between judicial and administrative powers, though, he adds, "the distinction is not yet, or likely to be, all-embracing" (Royal Commission on Local Government, 1923, Minutes of Evidence, Part I, M. 40, p. 20).

[2] See Public Health Act, 1890. Cf. Royal Commission on Local Government, 1923, Minutes of Evidence, part i., Gibbon, Q. 41, p. 4, and Q. 75-77, p. 5. But these new licensing duties were not given exclusively to the justices.

Hence, as Sir Edward Troup points out, "the Home Office was forced into the position of a final Court of Appeal in criminal cases, and had from time to time to review the whole of the evidence in the most difficult cases, and to arrive at a decision on the question of whether the law should take its course or the alleged offender should receive a free pardon, which in this case amounted to a declaration of his complete innocence, or to a conditional pardon, which mitigated the penalty, substituting, for instance, penal servitude for capital punishment. The Home Office possessed none of the ordinary powers of a court of law for this purpose . . ." [1] The Home Office has to a great extent been relieved of these particular functions by the establishment of the Court of Criminal Appeal; but the Secretary of State for Home Affairs still exercises many powers of a judicial nature, involving intricate questions of law and fact, ranging from the decision as to whether a man is or is not an alien, and if an alien, of what nationality,[2] to the commutation of the death penalty in capital offences.[3]

It is not only in the case of ancient offices, such as that of the Secretary of State for Home Affairs, that the administrator is called upon to act also as a judge. When, for example, the Charity Commissioners were established in the nineteenth century with the object of protecting charitable property from loss, and of fulfilling the charitable intentions of the donor, Parliament showered upon the devoted

[1] *The Home Office*, pp. 58-59. [2] *Ibid.* p. 153.

[3] In strict constitutional theory the prerogative of mercy resides in the person of the sovereign, and the Home Secretary can do no more than "move" the King to commute a death sentence in a suitable case. But in practice the decision rests with the Home Secretary.

heads of the Commissioners a huge number of inquisitorial, administrative and judicial powers in an undifferentiated conglomerate mass. Thus, the Commissioners may enquire into the condition and management of practically every charity in the country and demand for that purpose accounts, statements and sworn answers. As administrators they may give advice and directions concerning the management of charities, their consent is required before any legal proceedings may be taken in connection with a charity, and they may sanction the compromise of claims made by or against a charitable foundation; while as judges they may make orders for the appointment and removal of trustees, the transfer or vesting of real estate and, in general, exercise powers similar to those exercised by the courts prior to the passing of the Charitable Trusts Acts.[1]

Official Receivers, to take another instance, are administrative officials appointed and removable by the Board of Trade. They are compelled by statute to act under the general directions of the Board, but they are also officers of the courts to which they are respectively attached.[2] Some of their functions are clearly judicial.

Enough can be seen, even by these few examples, to show that official titles are unreliable as a guide to the kind of function which is performed by a public authority. A man may be called a judge

[1] Tudor: *Charities and Mortmain* (4th ed.), pp. 23-24. Most of the powers of the Charity Commissioners relating to educational foundations were transferred to the Board of Education by 62 and 63 Vic c. 33 and orders made thereunder. See Owen's *Education Acts Manual*, 1923, pp. 2, 5-14, 274.

[2] Bankruptcy Act, 1914, 4 and 5 Geo. V. c. 59, secs. 70, 73, 154-157, and 161.

and yet do many administrative acts; his title may indicate that he is an administrator, on the other hand, and he may nevertheless be constantly engaged in carrying out judicial functions. Plenty of administrative acts are performed in open court by judges arrayed in scarlet and ermine and surrounded by all the pomp and circumstance which for centuries has attended the administration of justice by the king's judges. And many an obscure civil servant, sitting bespectacled in a quiet office, is engaged in activities which partake of a judicial character.

ADMINISTRATIVE LAW IN ENGLAND

"It is curious", said Maitland, "that some political theorists should have seen their favourite ideal, a complete separation of administration from judicature, realised in England; in England of all places in the world, where the two have for ages been inextricably blended. The mistake comes of looking just at the surface and the showy parts of the constitution."[1] That was written in 1888, before the late Professor Dicey had published his celebrated treatise on the British Constitution. But despite the warning which Maitland uttered, Dicey did not look very far below the surface in regard to one of the main topics which he discussed in his book, namely, the question of whether a system of administrative law exists in England.

It is largely owing to Dicey's work that students of constitutional law and political science in England and the British dominions have become

[1] F. W. Maitland: "The Shallows and Silences of Real Life", *Collected Papers*, vol. i. p 478.

acquainted with the system of *droit administratif* obtaining in France. It is also entirely due to the same writer that for the past quarter of a century those same students have been labouring under the delusion that there is no administrative law in England. "*Droit administratif*", wrote Dicey, "is not to be identified with any part of English law."[1] English official law, he continued, is something quite different. The law which regulates the privileges of civil servants in England is merely the law of a class, whereas *droit administratif* is not the law of a class but a body of law which in given circumstances may affect the rights of *any* French citizen.

Administrative law in France is the system whereby actions in respect of wrongful acts which a citizen alleges have been committed by a public official in the course of his duty are tried, not by the ordinary courts of law, but by special administrative courts composed of civil servants or other officials more or less closely connected with the government. That is, shortly, the peculiar system which prevails in France.[2] It has been evolved out of the special circumstances of French history and is a legacy of the constitutional tradition established after the Revolution by Napoleon I. The

[1] *Law of the Constitution* (8th ed.), pp 380-381.

[2] There is an extensive literature on the subject of *droit administratif* in France The following works may be referred to on the subject: Laferrière: *Traité de la jurisdiction administrative*; Berthélemy: *Traité élémentaire de droit administratif*; Ducrocq: *Droit administratif*; Jèze: *Principes généraux du droit administratif*; Chardon: *L'Administration de la France, les Fonctionnaires*; Duguit: *Traité de droit constitutionnel*; *L'État, les Gouvernants et les Agents*; Esmein: *Éléments de droit constitutionnel*; Hariou: *Précis de droit administratif*, Jacquelin: *La Jurisdiction administrative*; also *Les Principes généraux du droit administratif*; Dieudonné: *Manuel de droit administratif*

distinguishing features which Dicey noticed in this system of *droit administratif* were: first, that the rights of the State are determined by special rules not applicable to private individuals; second, that the courts of law are without jurisdiction in matters concerning the State, and governmental litigation is tried by administrative courts; third, that a special protection is afforded to officials in respect of wrongful acts committed in the course of their official duties. The underlying principles which he observed were that the State is given exceptional and extensive privileges; and that a rigid distinction is maintained between administrative and other acts.[1]

There is, it is true, nothing similar to the French system in England; and Dicey was in a narrow sense justified in giving "a decided and negative reply"[2] to the question whether *droit administratif* had been introduced into the law of England. Any official, as he pointed out, who exceeds the authority given to him by the law, is liable to be sued in the ordinary courts of justice and mulcted in damages or otherwise made to redress his wrong.

But because there is no *droit administratif* in England it does not follow that we are without a system of administrative law. In the earlier editions of his book Dicey had maintained that though in England the powers of the Crown and of civil servants might be increased from time to time, they must always be exercised in accordance with the ordinary common law which governs the relation of one Englishman to another.[3] In the last edition

[1] *Law of the Constitution* (8th ed.), ch. xii. [2] *Op. cit.* pp. 383-384.
[3] *Op. cit.* p. 382.

published during his lifetime,[1] he displayed in a long additional introduction a certain uneasiness at the argument which he had for so long adopted in the body of the work. For he remarked that during the last thirty years the extension of the duties and authority of English officials had produced in the law governing bureaucrats some of the characteristics of the hated *droit*. The law of England, he feared, was being "officialised" under the influence of Socialistic ideas.[2] But, he concluded, sweeping aside all these unquiet thoughts and reverting to his original position, "It would be a grave mistake if the recognition of the growth of official law in England . . . led any Englishman to suppose that there exists in England as yet any true administrative tribunals or any real administrative law."[3]

But uneasy lies the head that writes a book on the British Constitution. The following year (1915) saw the publication of almost the last contribution which Dicey made to the subject of which he was for generations the leading exponent: it was a short article in the *Law Quarterly Review*—a mere fragment bearing the significant title "The Development of Administrative Law in England".[4] In spite of A. V. Dicey's undisputed eminence and learning, had it not been for this inconsiderable fragment in a learned periodical, demonstrating as it did a remarkable ability to abandon at the last moment the ideas of a lifetime, it would have been difficult not to feel that in old age he had lost that capacity for the careful observation of political institutions and legal phenomena which had made

[1] The 8th edition, issued in 1914.
[2] *Ibid.* Introduction, xliv.
[3] *Loc. cit.*
[4] Vol. xxxi. p. 148.

him the most distinguished writer on English Constitutional Law of his time.

President Lowell of Harvard, in his well-known book *The Government of England*, adopts a similar point of view to that which Dicey held. "The Parliamentary government of England", he says, "is . . . a government according to law and by means of law. . . . One result of this has been the absence of a body of administrative law, with peculiar principles of its own, enforced by special tribunals distinct from the ordinary courts. . . . Nor has the great increase in the nineteenth century of central control over local government brought any real approach to administrative law of the continental type. Boards with official functions, such as the Railway Commission, have, indeed, been created, but they do not stand in at all the position of administrative courts. . . ." [1]

Lord Hewart, Lord Chief Justice of England, in addressing the American Bar Association at Buffalo in September 1927, is reported to have said that the Common Law does "not recognize any *droit administratif*. Every person, whatever position he might occupy in the State, is subject to the law of the land, and there are no special tribunals for the trial of matters in which public departments or Ministers of State are concerned." [2]

Sir John Marriott, M.P., in his recent work recites the well-worn tale that a "marked feature" of the English government is "the acceptance in the fullest sense of the *Rule of Law*". Summarily, it

[1] A. Laurence Lowell: *The Government of England*, vol. ii. p. 489.
[2] *The Times*, Sept. 2, 1927, and Sept 30, 1927.

may be said, "it is by the supremacy of the law, and the 'ordinary' law, that the government of England is most clearly differentiated from that of countries where, as in France, there exists side by side with the ordinary law a code of rules constituting the *droit administratif*. . . ." [1]

What I hope to demonstrate in the following pages is that, whether or not we have a "government according to law and by means of law" there is in fact at the present time in England a very considerable body of administrative law. By administrative law I understand the jurisdiction of a judicial nature exercised by administrative agencies over the rights and property of citizens and corporate bodies. Professor Frankfurter describes administrative law as the law covering the fields of legal control exercised by law-administering agencies other than courts, and the field of control exercised by courts over such agencies; [2] and this description will serve to describe the subject-matter of our enquiry.

It will become clear from the following chapters that one of the most remarkable developments in the British Constitution during the past fifty years is the appearance of a whole series of official tribunals, more or less closely connected with the administrative departments of government, possessing power to decide questions of a kind which would "normally" have come within the jurisdiction of the formal courts of law. There is a great diversity both of structure and of function to be observed in the

[1] Sir J. A. R. Marriott: *The Mechanism of the Modern State*, vol. i. p. 163.

[2] *Harvard Law Review*, vol. xxxvii. p. 638.

welter of official tribunals which I shall presently describe. Many of the matters with which they deal are of great importance, and in the large majority of cases their decisions are as conclusive and as binding as those of the formal courts of law, whose authority, indeed, has in most cases been either diminished or excluded altogether in regard to the matters in question.[1]

The reason for this growth, or, as it might be called, this revival of administrative law in England, is not far to seek. With the extension, during the nineteenth and twentieth centuries, of the functions of government to one new field after another, with the progressive limitation of the rights of the individual in the interests of the health, safety and general welfare of the community as a whole, with the development of collective control over the conditions of employment, the manner of living, and the elementary necessities of the people, there has arisen a need for a technique of adjudication better fitted to respond to the social requirements of the time than the elaborate and costly system of enforcement provided by litigation in the courts of law. A demand has arisen for a new type of justice which shall be less like what Dean Roscoe Pound calls "a system of hands off while individuals assert themselves freely" and more like "a social institution existing for social ends".[2] Whether or not the administrative tribunals which have been set up do satisfy that demand, what advantages and disadvantages they can be seen to possess, are questions which will be answered in due course.

[1] Dicey, *Law of the Constitution*, Introduction, xxxviii.
[2] *The Spirit of the Common Law*, p. 197.

But regardless of whether their existence is desirable, there is no doubt that the revival of administrative law in England is very largely due to the creation of new types of offences against the community, the growth of a new conception of social rights, an enhanced solicitude for the common good, and a lessening of that belief in the divinity of extreme individualistic rights which was evinced in the early nineteenth century. Whatever may be the reason for its creation, however, it is impossible to say that our régime of administrative justice is not part of the law.

THE HEGEMONY OF THE EXECUTIVE

One important result of this development is clear beyond doubt: namely, that the administrative departments of the State have acquired an immense accession of power. Despite the fact that Parliament places annually upon the statute book an ever-increasing burden of legislative efforts, it is nevertheless true to say that the centre of gravity in English government has shifted from legislation to administration during the past half-century, and the hegemony of the executive, whether we like it or not, is an accomplished fact. The nineteenth century relied primarily upon legislation which was to a large extent "self-operating"—that is, enforced by citizens in their private capacity; but we in the twentieth century rely primarily upon administration created by Parliament to carry out its own Acts. Since I am not concerned here with legislative functions I shall make no comment upon the wide legislative authority which has been conferred upon

government departments in recent times; on the frequent power to make rules and orders which shall give content to loosely-woven statutes, on the ability to fix "appointed days" that shall bring into force or defer the operation of whole Acts of Parliament. The delegation of legislative power by Parliament to administrative agencies in general, and to the great departments of State in particular, is now one of the commonplaces of English political life.[1] But even confining ourselves to a survey of certain aspects of administrative and judicial functions, it will become apparent in the course of our enquiry that enormous inroads have been made by administrative departments on a province which a century ago was regarded as the jealous preserve of the judiciary.

It must not be assumed that there is anything inherently and necessarily evil in that movement. Providence has not ordained any particular method of allocating governmental powers. When Professor J. H. Morgan[2] denounces the acquisition of judicial functions by the executive as being "all the more unwarrantable" because of the fact that the courts of law have not in their turn encroached on the functions of the executive, he writes as though the executive and the judicature were riparian owners bargaining over a strip of land or European powers carving up an African colony. Neither the executive nor the judiciary has any immutable "right" to a particular province: it is merely a matter of expediency what powers are allocated to

[1] Cf. Frank J. Goodnow: *Comparative Administrative Law*, vol. i. p. iv; also C. T. Carr: *Delegated Legislation*.

[2] Introduction on "Remedies against the Crown" to Gleeson Robinson: *Public Authorities and Legal Liability*, p. xliv.

either of them at any particular time ; and the social welfare is the only valid test of what is desirable.[1]

CONCLUSION

After a long and somewhat painful evolution we have come to regard the determination of a question by a court of law as carrying with it an assurance that the matter will be decided by means of a certain process. That process involves the application of a body of rules or principles by the technique of a particular psychological method ; the whole decision taking place within a framework possessing recognisable institutional features. The body of rules or principles is the law ; the psychological method consists in the application of what may be called the judicial mind ; and the institutional framework is the Court system. The entire process, in which the three are used in combination, is denoted by the expression Justice According to Law.

A very great deal has been written and talked, during the past two thousand years, about the changing body of doctrine which we term the Law. Hardly anything has been said about that equally important element in the judicial process which may be called the Judicial Mind. Without a

[1] In contrast to Professor Morgan, it is interesting to note that Sir Claud Schuster, G.C.B., K.C., the Permanent Secretary to the Lord Chancellor, in giving evidence before the Royal Commission on Local Government, described the judicial, police and administrative functions of the justices of the peace, and then remarked . " No one on earth can analyse the thing and say, ' such and such things they ought not to do, because they are administrative, and such and such things they ought not to do, because they are police matters ', because that must depend upon the sort of general view you take of the universe. There is no eternal right in the matter " (Royal Commission on Local Government, 1923, Minutes of Evidence, part ii. p. 428, Q. 6442-6443).

judicial mind to apply it, our body of law would disintegrate in a year, and society relapse into savagery. We should witness the sort of movement which is spoken of in connection with semi-civilised American Indians as "a return to the blanket". Of all psychological developments, perhaps none has been more important in the history of man than the gradual emergence of the "judicial" idea, not merely in regard to questions which come before the courts of law, but also in reference to a vast province covering nearly all the rational activities of the human race. Our æsthetic and moral "judgments", our scientific theories arrived at according to "the weight of evidence", our disapproval of an "injudicious" speculation on the Stock Exchange, are all extensions and developments of the mental processes and conceptions which were evolved in the courts of law even if they did not originate there.

I propose in a later chapter to analyse the nature of this judicial mind; and we can then enquire whether, with the rise of administrative law in England, there has been a spreading of the judicial outlook to those administrative tribunals of which we have already spoken.

This, after all, is the vital question. For the predominant virtue of the judicature lies only in the fact that it thinks and acts judicially and is recognised as doing so: that, and that alone, is the essence of its merit, platitudinous though it may seem to say so. And accordingly, if we find that the administrative organs of justice have developed the tradition and the ability to arrive at decisions in a judicial manner, we need spill no tears of regret

merely because they do not bear the institutional characteristics of the former courts of law. What society needs is the operation of a judicial spirit far more than an insistence upon the mere outward features of a formal court; though, as we may discover, some of those outward characteristics are necessary before the judicial spirit can emerge or flourish with any guarantee of stability. Again and again in the history of civilisation, what appeared at first as an arbitrary discretion wielded by an irresponsible official, gradually crystallised into a body of known, ascertainable and consistently-applied law. An outstanding example of this is the equitable jurisdiction exercised originally by the Lord Chancellor and now administered by the Courts of the Chancery Division. That originally had in it "an arbitrary or discretionary element",[1] to say the least; but even before the end of the seventeenth century it was clear that equity was growing into a system of law almost as certain and recognisable as the Common Law itself. In other words, the judicial mind was asserting itself and accomplishing a stabilising process which can be observed at work in many countries and at many epochs. So when Sir Frederick Pollock warns us that "there is an ever growing tendency, constitutional traditions and safeguards notwithstanding, to confer more and more discretion, often of a substantially judicial kind, on officials of the great departments of State who practically cannot be made responsible",[2] it may be suggested that, rather than to wring our hands over a *fait accompli*, it is more

[1] A. V. Dicey, *Law of the Constitution*, p. 376.
[2] *The Genius of the Common Law*, p. 43.

profitable to see whether these officials are displaying any signs of developing a judicial technique; and, if they are not, to endeavour to discover by what means, if any, a judicial attitude of mind may be developed.

No single change in the life of the world is needed more urgently or would bring about a greater improvement than that mankind should exhibit a more judicial frame of mind in certain departments of life. All our efforts at securing international peace by means of an organisation which shall prevent civilisation being once again turned into a wilderness of internecine strife; all our attempts at producing industrial agreement by some method less inevitably impoverishing than the long-protracted economic conflict which now casts a blight over our productive capacity; every voice which pleads for a treatment of native races more disinterested than that meted out only too often by the concession-hunter intent upon his own gain: all such efforts as these may be reduced to a single plea that men and women should act in a more judicial spirit.

What, then, we may ask, is the relation between that spirit and the judicial process which goes on in the courts of law and from which the very conception is borrowed? Is there no significance in the use of a single word for both purposes? We are inclined to go so far as to suggest, indeed, that the whole modern conception of economic and social democracy involves the exercise of discretions which shall be "judicial" in that they are not to depend on individual caprice and shall be free from personal favour and individual self-interest; and this may

imply an extension in certain respects of the judicial mind, an application of mental habits common among those who administer the judicial process.

But we are anticipating. This enquiry aims at embodying something more concrete than an investigation into habits of mind. It is primarily a study of actual institutions; or, to put it more exactly, of the social organs through which the judicial process is carried on and in which the judicial mind operates. What I propose to do is, first, to examine the institutional characteristics of purely judicial functions as compared with administrative functions; next, to describe the structure and function of Administrative Tribunals and Domestic Tribunals. There will follow an analysis of what I have called the judicial mind; and, finally, I shall endeavour to assess the advantages and disadvantages of the administrative tribunals already discussed, and to formulate certain conclusions of a practical nature regarding their structure and functions.

CHAPTER II

JUSTICE IN THE COURTS

Popular Notions of the Judicial Process—The Independence of the Judge—The Immunity of the Judge—The Responsibility of the Administrator—The Integrity of the Judge—The Integrity of Administrators—The Judge must Act Personally—The *Lis Inter Partes*—The Right to be Heard—According to the Evidence—The Case in Hand—A Final Decision—Conclusion

POPULAR NOTIONS OF THE JUDICIAL PROCESS

THE word "judicial" is closely bound up nowadays, in the minds of most people, with the idea of a court of law. If six or seven people walking in a London street were stopped at random and asked to describe, on the spur of the moment, what they understood by judicial proceedings, most of them would probably refer in one way or another to the courts of justice. One might be thinking of the latest sensational murder trial of which he had read in the morning's newspaper; another of the County Court where his landlord had recently tried to evict him from his house; another (the son of an agricultural labourer) of the local bench of justices where poachers get punished; another, whose father died recently in an abnormal mental condition, of protracted litigation in the Probate Court over the will; another of a spin in a fast car, a brush with the police and a narrow escape before

the local stipendiary magistrate; a sixth might have in mind a vague memory of service on a jury years ago in some forgotten libel action; a seventh the humiliating publicity likely to ensue from a petition for divorce in which he will shortly be concerned. In the minds of all of them the idea of judicial proceedings will almost certainly be inseparably connected in some way with one or more of the various courts of law of which the formal part of the judicial system is composed. None of them (unless he is a trained lawyer) is likely to have an accurate mental picture of the entire system of judicature, with the House of Lords at the top and the County Court or the Courts of Summary Jurisdiction at the bottom, or to understand the different lines of ascent for civil and criminal cases, or to know the difference between quarter sessions and assizes, or to be conversant with exactly what sort of appeal may be brought before the Judicial Committee of the Privy Council. But this lack of detailed knowledge will not affect the general conception which leads most people to identify judicial functions with the formal courts of justice.

The Oxford *English Dictionary* bears out the man in the street in this matter. The first and most important meaning given therein to the word "judicial" is "of or belonging to judgment in a court of law, or to a judge in relation to this function; pertaining to the administration of justice; proper to a court of law or a legal tribunal; resulting from or fixed by a judgment in court". Tomlin's *Law Dictionary* follows the same line of thought in defining judicial decisions, opinions, or determinations as "the sentiments of the judges

delivered in a cause in court before them, and which form the decree or judgment of the court." [1]

When people identify judicial functions in this general sort of way with a court, or a hierarchy of courts, they are clearly not using the word in its original meaning. *Curia*, or court, formerly signified the king's palace [2] or mansion, and we still talk about the Court of St. James's, or of the Court having moved to Windsor, when we intend to refer to the king's person or entourage. In early times the royal judges sat in the king's residence, which thus came to be identified with the administration of justice. This continued even when the actual hall or room used by the judges ceased to be connected geographically with the king's palace. Thus, Blackstone observes that "a court is a place where justice is judicially administered." [3] In the course of time the word "court" has come to denote, not merely the hall in which the judges sit for the conduct of public business, but also the actual tribunal itself, which is frequently spoken of as "the court".[4] And, as we suggested above, the idea of courts of law is now almost inseparably connected, in the popular mind, with the notion of judicial proceedings.

But the mental image which is raised by the

[1] Cf. *in re* L.G.B (1885), 16 L.R.Ir., p. 150.

[2] Jacob: *Law Dictionary—sub voce*, court; Halsbury: *Laws of England*, vol ix. p. 8.

[3] See Stroud: *Judicial Dictionary*, vol. i. p. 424. See also Co. Litt. 58 (*a*).

[4] Cf. E. Jenks: *Law and Politics in the Middle Ages*, p. 134. Professor Jenks points out that questions coming to the king's court at first were offences against the king's peace, against the royal property, etc., which were decided by domestic officials, who constituted his *hof* or *palatine*, his curia. "At first, this body is not a judicial body at all. . . . It is the Court of St. James's, rather than the Court at Temple Bar."

conception of the judicial process is but remotely related to the buildings which comprise the court houses which happen to be known to a particular individual; or, at least, that is not the important part of the image. Underlying the conception of the judicial function as a process administered in a court of law is a whole series of ideas, scarcely any of which could probably be formulated coherently by our man in the street, but each one of which has a more or less definite place in the vague thoughts flitting through his mind. In this chapter an attempt will be made to describe the essential characteristics underlying the general notion of justice administered according to law in courts civil and criminal. Wherever possible we shall compare or contrast those characteristics with corresponding features of the administrative process.

THE INDEPENDENCE OF THE JUDGE

The establishment of impartial justice is by no means the same thing as the formation of a court of law in our modern sense.[1] But of all primitive ideas of justice, none is more fundamental than that which predicates a judge who is impartial. Impartiality involves various psychological factors, of which we shall have something to say later; but it also requires certain institutional conditions.

The first of these conditions is the independence of the judiciary. The principle of judicial independence has not always obtained in England in past times, nor does it always obtain abroad to-day. There is a deep historical significance in the lines of

[1] L. T. Hobhouse: *Morals in Evolution*, p. 115.

Shakespere's *Henry the Eighth*,[1] where the wretched Queen Katherine passionately declares :

> Heaven is above all yet; there sits a judge
> That no king can corrupt.

But speaking generally we have now established a system whereby the tenure of office of the judge does not depend on the favour of the government of the day ; nor, let us add, on the pleasure of great interests outside the administration. Whether or not the decisions of a judge bring satisfaction or anger to the Prime Minister and his colleagues, or to the Lord Chancellor, he cannot be dismissed at will. His tenure is for life, or until retirement, subject only to good behaviour. His salary is fixed and paid out of the Consolidated Fund in order that it may not be subjected to that running fire of criticism in Parliament to which all the ordinary items of budgetary expenditure are liable.[2] His conduct cannot even be discussed in Parliament save on a substantive motion for an address for removal from office : an extreme step to be taken only in the event of impropriety of the gravest kind.[3]

The judiciary is, in effect, part of the public service of the Crown. But a judge is not " employed " in the sense that a civil servant is employed. He fills a public office, which is by no means the same thing ; and part of his independence consists in the fact that no one can give him orders as to the manner in which he is to perform his work. Like the more fortunate practitioners in most professions

[1] Act. III., scene i., line 100.

[2] See Robert MacGregor Dawson : *The Principle of Official Independence*, 1922, p. 12.

[3] Sir T. Erskine May : *Parliamentary Practice* (13th ed.), p. 271.

he "owns no man master". The only subordination which he knows in his official capacity is that which he owes to the existing body of legal doctrine enunciated by his brethren, past and present, on the bench, and the legislative enactments of the King in Parliament.

The administrator of public services, on the other hand, is an employed person *par excellence*. Not in the sense that he is liable to be hired and fired at a moment's notice, for under modern conditions the great mass of State and municipal officials have been given a security of tenure which in the vast majority of cases is (in practice if not in law) as complete as that of the judge; but in the sense that employment involves a subordination to higher authority, a liability to receive instructions as to the work to be done and the manner in which it is to be performed—a liability which pervades the entire realm of public administration. This distinction was well brought out in a recent case which came before the House of Lords. A Clerk of the Peace, who by statute also necessarily holds the position of Clerk to the County Council, claimed that he could not have his appointment terminated by notice in the ordinary way, despite the fact that his contract of employment as Clerk to the County Council expressly provided that six months' notice on either side should terminate the appointment. The House of Lords unanimously decided that a Clerk of the Peace is irremovable except for misconduct, and that the appointment is, therefore, virtually a freehold for life.[1] The decision really turned on the question whether the Clerk of the

[1] Lord Leconfield *v.* Thornely (1926), A.C., p. 10.

Peace was the holder of an office of a judicial nature under the Crown or an official employed by the Local Authority. According to Lord Buckmaster, the fundamental fallacy underlying the County Council's case lay "in the view that the Joint Committee (of the County Council and the Justices of the Peace for the County) contracted for the service of an officer instead of merely exercising the powers of appointment to an office. The respondent was not engaged as their servant; he was Clerk of the Peace in the service of no one except the Crown." In other words, the Clerk of the Peace enjoys what may broadly be regarded as a judicial tenure of office, and does not occupy the "employed" position of an administrator.

This distinction as to tenure is not, it may be contended, a fundamental one. It merely happens that at a particular time it is customary in England to appoint judicial authorities in one way and administrative officials in another; and it is quite possible to imagine large alterations in these arrangements without any far-reaching changes being produced in the manner in which administrative and judicial functions are exercised, or in the real grounds of their differentiation. Thus, for example, judges might be appointed for a set term of years—a decade, let us say—and administrative officials might have a contract for life subject only to good behaviour; and no immediate change might be perceptible in the method of carrying out their duties. The only real bearing which the matter has on our discussion is the effect that tenure of office has on the mental processes which are involved in the making of a decision. In so far as the

ultimate possibility of dismissal induces the administrator to take into consideration the will of his superiors in deciding a question,[1] it is important; just as the relative security of tenure of the judiciary is important in so far as it enables the judge to adopt a particular attitude of mind towards the problem before him and to decide the case without fear of the consequences; regardless, that is to say, of whether the decision does or does not please some other person or persons. The administrator continues to fulfil his functions only so long as his activities in general please, or at any rate do not actively displease, someone in authority above him. This is not the case with the holder of a judicial office, who can displease an indefinite number of persons an indefinite number of times without any personal consequences ensuing to himself, providing only that he remains sane and does not commit one of those enormities which constitute misconduct.

Thus, in so far as it produces psychological effects in regard to the making of decisions, it is clear that the independence of the judge from control in his official duties does have definite results. A judge may give an unlimited number of decisions which are wrong in law and based on incorrect findings of fact, without incurring a penalty; and the continual reversal of his judgments by the higher courts will lead to no consequences affecting him personally, at any rate in England, where promotion and demotion scarcely exist on the bench,

[1] The Royal Sanitary Commission of 1871 observed that "In order that Medical Officers of Health may be able to discharge their duties without fear of personal loss, they shall not be removed from office by any local authority except with the sanction of the central authority" (Second Report, p. 35).

save to the most limited extent. But this is not the case with the administrator. An incorrect or even an unwise decision, though supported by his superiors in public, may lead behind the scenes to an absence of promotion, less responsible work, or even to dismissal from office in a serious instance. In the case of judicial functions it is invariably the subject-matter of the decision—that is, the judgment and the reasoning underlying it—which are alone liable to criticism and reversal. In the case of administrative functions it is rather the ability and judgment of the administrator himself which are looked at askance when mistakes are made, and his personal career is liable to suffer in consequence of those mistakes. Furthermore, the judge takes no orders, in the ordinary sense of the term.

The security of tenure which the judge enjoys is at bottom the most essential fact underlying the principle of independence. It results in a recognition by the general public that the judge has nothing to lose by doing what is right and nothing to gain by doing what is wrong ; [1] and is founded on the belief that a man cannot be relied upon to act rightly regardless of the personal consequences.

The independence of the judiciary lends prestige to the office of judge and inspires confidence in the general public. It acts as a safeguard, not merely against the manipulation of the law for political purposes at the behest of the government in power, but also against the corruption of the judicial organs of the State by the bribery and intimidation of powerful outside interests which threaten the impartial administration of justice from time to time.

[1] R. MacGregor Dawson : *The Principle of Official Independence*.

"The psychological fact behind the principle of independence", writes Mr. Graham Wallas,[1] "is not the immediate reaction of feeling in a man whose impulses are obstructed, but the permanent result in his conduct of the obstruction of some impulses and the encouragement of others. We make a judge 'independent' not in order to spare him personal humiliation, but in order that certain motives shall not, and certain other motives shall, direct his official conduct." The existence of this psychological fact might be proved by many examples, past and present. We may take as a single instance the conflict which took place a century ago in New South Wales between Governor MacQuarie and Ellis Bent, the judge advocate and first judge of the Supreme Court of the Colony, concerning the independence of the latter. Friction arose between the two over such questions as whether emancipated convicts should be permitted to practise in the local courts; and it was inflamed by the Governor sending a draft of some proposed Port Regulations to the judge for revision and correction after the latter had declared that in his opinion they were illegal.[2] Bent found the position of subordination to the Governor which MacQuarie expected him to accept intolerable, and he addressed a request to the Home Department that he should be accorded "that independence of the Colonial Government which . . . is so essential to the upright execution of my office."[3]

The independence of the judge is, we may con-

[1] *Our Social Heritage*, p. 188.
[2] Marion Phillips: *A Colonial Autocracy*, pp. 210-220.
[3] *Ibid.* p. 211.

clude, of essential importance in so far as it enables the judge to adopt a particular attitude of mind towards the questions which come before him for decision. He can, in short, determine the case before him without fear that adverse results or material reward will accrue to him according to whether the decision does or does not meet with the approval of other persons.

THE IMMUNITY OF THE JUDGE

Not only is the judge given an almost complete independence in the tenure and conduct of his office, but certain immunities of an important character are extended to him in his official capacity. The most notable of these is an immunity from legal responsibility in respect of his judicial functions. "It is a principle of our law", said Mr. Justice Crompton in 1863, "that no action will lie against a judge of one of the superior courts for a judicial act, though it be alleged to have been done maliciously and corruptly."[1] Lord Justice Kay, in reasserting the principle more recently, widened the rule to include apparently any judge, and extended the immunity even to acts done "for the purpose of gratifying private spleen."[2] The rule has been held to apply to justices of the peace sitting to try criminal cases,[3] and to naval and military courts-martial. And even an arbitrator is immune from an action for lack of skill or negli-

[1] Fray *v.* Blackburn (1863), 3 B. and S., p. 576, at p. 578.

[2] Anderson *v.* Gorrie (1895), 1 Q.B., p. 672; Scott *v.* Stansfield (1868), L.R., Ex. 220.

[3] Royal Aquarium *v.* Parkinson (1892), 1 Q.B.D., at p. 431.

gence in making his award,[1] provided he complies with certain elementary conditions.

There are no limits to the immunity enjoyed by a judge when acting in his official capacity: the protection is absolute and unqualified. He may insult the jury, as in the case of one Skinner, a justice of the town of Poole, who in 1772 was indicted for scandalous words spoken by him in general sessions of the county, when he said to the grand jury, "You have not done your duty; you have disobeyed my commands; you are a seditious, scandalous, corrupt and perjured jury"—and no indictment will lie.[2] He may even imprison the jury for non-payment of a fine imposed for giving a verdict against his own direction: and still no action will lie against him.[3] Furthermore, the immunity from legal responsibility extends not merely to the judge personally, but to all the persons before the court, such as the parties to the litigation, their witnesses, counsel, and solicitors;[4] and it includes ancillary officials such as an official receiver.[5]

This immunity of the judge is a comparatively modern development, and did not exist in early times. Formerly, indeed, the procedure by means of which the decision of a court was questioned actually took the form of a complaint against the judge personally. The modern rules originated somewhat mysteriously in the sanctity of the record

[1] Russell: *Arbitration and Awards* (11th ed.), p. 202.
[2] R. *v.* Skinner, Lofft's Reports, p. 55, Lord Mansfield.
[3] Hammond *v.* Howell (1678), 2 Mod, p. 218.
[4] R. *v.* Skinner, *supra*, Lord Mansfield.
[5] Bottomley *v.* Brougham (1908), 1 K.B., p. 585; Burr *v.* Smith (1909), 2 K.B., p. 306.

of a Court of Record; but they were stressed and strengthened by the desire of the judges to be free from the interference of rival courts, such as the Star Chamber.[1] It was not until the beginning of the seventeenth century that Lord Chief Justice Coke for the first time interpreted the immunity of the judge in terms of public policy. The judges, he said, are to make an account to God and the King only; for otherwise "those who are the most sincere would not be free from continual calumniations."[2] In a modern case the judge explained that the absolute privilege attaching to the statements and actions of judges, advocates, witnesses and others is not a privilege to be malicious, but a privilege to have judicial proceedings exempt from all enquiry whether malice or other wrongful element were present or not. "The real doctrine of what is called 'absolute privilege'", said Channell, J., "is that in the public interest it is not desirable to inquire whether the words or acts of certain persons are malicious or not . . . the reason being that [judges, advocates and litigants] should be perfectly free and independent."[3]

This protective mantle thrown over the judge's shoulders is a garment that was woven by the common law, though the fabric has from time to time been strengthened by Acts of Parliament.[4] Only one chink is still left in the armour: to wit, the requirement that the judge must necessarily be

[1] W. S. Holdsworth: "Immunity for Judicial Acts", *Journal of the Society of Public Teachers of Law*, 1924, p. 17

[2] Floyd *v.* Barker (1608), 12 Co. Rep., at p. 24.

[3] Bottomley *v.* Brougham (1908), 1 K.B., p. 584.

[4] See, for example, 11 and 12 Vic. c. 44 (1848), "An Act to Protect Justices of the Peace from vexatious actions for Acts done by them in execution of their office".

acting within his jurisdiction. The immunity of the judge prevails only so long as he keeps strictly within the metes and bounds of his authorised domain; so soon as he ventures outside them, or commits acts of an extra-judicial character or alien to his judicial duty, immediately he becomes exposed to the chill winds of legal liability.[1] Absence of jurisdiction may arise for many different reasons; but whatever the cause, where there is no jurisdiction, there the immunity fades away more quickly than the setting sun. In Professor Holdsworth's view the fact that for three centuries—from the sixteenth to the nineteenth—most of the local government of the country was administered by justices of the peace, made it essential to draw a distinction between judicial acts done within jurisdiction and administrative acts of a non-judicial character, if an intolerable tyranny was to be averted; and the distinction is clearly maintained on those lines in certain statutes which aim at protecting the justice of the peace.[2]

Be that as it may, there is no doubt but that the immunity of the judge is one of the typical characteristics of the administration of justice in England; and the tendency of the courts is to extend the protection of at least a qualified immunity to all persons who are called upon to perform functions of a judicial character, regardless of their official title and nominal position.[3]

[1] Halsbury: *Laws of England*, vol. xxiii. p. 326.

[2] W. S. Holdsworth: "Immunity for Judicial Acts," *Journal of the Society for Public Teachers of Law*; cf. 11 and 12 Vic. c. 44.

[3] Everett *v.* Griffiths (1921), 1 A C., p. 631; but compare Local Government Board *v.* Arlidge (1915), A.C., p. 120; Board of Education *v.* Rice (1911), A.C., p. 175.

But protection from legal liability is not the only sort of immunity which may be offered to a judge worthy of his position. There are certain extra-legal immunities which are of great importance in strengthening the position occupied by the judicature in the public estimation. One of these is the freedom from Parliamentary criticism normally enjoyed by judges. The Speaker will rule out of order any attack on the conduct of a judge unless it takes the form of a substantive motion such as an address for removal from office [1]—an extreme step which is only resorted to in cases of serious impropriety. No question may be asked in Parliament, again, if it reflects on the character or conduct of a judge or makes direct or implied charges of a personal character; [2] and no reflections may be cast on the conduct of judges in debate, except in a discussion based on a substantive motion.[3] The judge shares, in fact, the same degree of immunity from Parliamentary criticism as that accorded to the King, the Viceroy of India, the Speaker, and other highly privileged personages; and in practice he enjoys an almost complete protection from attack by members of the legislature.

Even more important is the immunity enjoyed by the English judicature from attacks by the Press. Certain forms of scandalous abuse or defamation of a judge by a newspaper amount to contempt of court and are punishable as such by fine or imprisonment by the court itself. But serious criticism in the Press is another matter altogether and is in

[1] Sir T. Erskine May: *Parliamentary Practice* (13th ed.), p. 271; cf. Robert MacGregor Dawson: *Principle of Official Independence*, 1922, p. 46. [2] Erskine May, p. 243. [3] *Ibid.* p. 324.

law permissible, provided it is not made in respect of a case *sub judice*. But in practice it rarely takes place, and in effect the judiciary enjoys an almost complete immunity from attack either in the Press or on the platform.

THE RESPONSIBILITY OF THE ADMINISTRATOR

With the complete immunity from legal liability enjoyed by the judge we may compare the responsibility before the law of the administrator in respect of acts committed in his official capacity. We are not concerned here with the large subject of the freedom of the Crown from liability to be sued in actions for tort, nor with the special protection afforded to public bodies by such statutes as the Public Authorities Protection Act, 1893, but rather with the liability attaching at common law to a particular official for his individual acts.

Broadly speaking, any official who exceeds the authority given him by the law incurs a personal responsibility at common law for his act, and is amenable to the authority of the ordinary courts of justice.[1] That principle is one of the foundations of administration according to law.

"The business of administration", says M. Duguit, "is the management of the business of the State in conformity with the law."[2] But the government of a State need not necessarily be carried on in accordance with settled rules and principles of any kind. Administration according to law is possible only when there are organs to impose law on the executive and courts of law to

[1] A V. Dicey: *Law of the Constitution*, pp. 383-384.
[2] L. Duguit: *Law in the Modern State*, Eng. tr., p. 158.

apply it; and even then it does not always exist. There has been in the past, and there still is in many countries, administration without law. And such administration is not even necessarily bad or inefficient.[1] But it affords no protection to the individual, and the liberty of the subject may be the plaything of the governing power of the day.

Administration according to law is, indeed, a comparatively late development in history. It made its first appearance in an embryonic form in England under the Angevin kings, but it did not take definite shape until after the Revolution of 1688, when the conception of government according to law had been placed on a firm theoretical basis by Locke in his treatises on government. The establishment in practice of administration according to law was in the same century developed by the rise of the justice of the peace as an executive and judicial authority. "Whatever the justice has had to do", writes Maitland,[2] "has soon become the exercise of a jurisdiction; whether he was refusing a licence or sentencing a thief, this was an exercise of jurisdiction, an application of the law to a particular case." The inextricable mingling of legislative, judicial and administrative functions in the single person of the justice resulted in a limiting and defining jurisdiction being extended to his administrative functions no less than to his other activities, and any overstepping of the limits thus laid down involved a legal liability.

This responsibility before the law was of a two-

[1] See Nagendranath Ghose: *Comparative Administrative Law*, 1917, Calcutta, particularly the excellent first chapter, which is most suggestive.

[2] F. W. Maitland: "The Shallows and Silences of Real Life", *Collected Papers*, vol. i. p. 478.

fold nature. In the first place, the act itself, whatever it may have been, was subject to review, and liable to be set aside by the court. In the second place, the administrator was himself liable for damages if his executive exuberance resulted in wrongdoing to another person. We shall have more to say later regarding the review by the courts of administrative determinations; all we are concerned with here is the fact that the complete immunity from personal liability which is enjoyed by the judge is not extended to the administrator, although the latter may sometimes occupy a more privileged position than that possessed by a private citizen. Thus, a county councillor who makes a defamatory statement at a meeting of the London County Council regarding an applicant for a music and dancing licence is held to be entitled to no greater protection than that which applies to any communication made without malice on a privileged occasion; and he is liable for slander when it is shown that through an indirect motive he recklessly states what he does not know to be true.[1]

Generally speaking, an action will lie against any individual who is charged with the performance of a public duty of an administrative character, either for breach of the duty or for negligence or malice in the fulfilment of it, if brought at the suit of an interested person who has suffered injury thereby.[2] The presiding officer at an election, for example, has two duties of an administrative nature imposed on him by the Ballot Act, 1872: namely,

[1] Royal Aquarium and Summer and Winter Garden Society *v.* Parkinson (1892), 1 Q.B.D., p. 431.

[2] For limitations to this principle, see Gleeson Robinson: *Public Authorities and Legal Liability*

to deliver to the voter a ballot paper bearing the official mark, and to be present during the election at the polling station so that voters may show him the mark on the paper before dropping it in the box. For breach of either of these duties an action will lie against the officer by a person aggrieved, such as a candidate who has lost an election because votes given him were void for lack of the mark.[1]

This liability of the administrator for the neglect or misuse of his authority is a safeguard of considerable importance to the citizen whose personal liberty or property is interfered with in the public interest. It may be socially advantageous that such interference should take place; but it is also desirable that the person entrusted with the business of interfering should have some personal responsibility in the matter. Incidentally, this makes the differentiation of judicial and administrative functions a matter of more than academic interest.

THE INTEGRITY OF THE JUDGE

In return, as it were, for his independence and immunity, the judge is required to observe certain conditions in the performance of his official functions. The first of these is that he shall not have any interest in the subject-matter of the litigation coming before him. The most obvious kind of personal concern which is prohibited is a financial interest, direct or indirect, in the matter to be determined. "There is no doubt", said Mr.

[1] Pickering *v.* James (1873), L.R., p. 8; C.P., p. 489, at p. 503; Prichard *v.* Mayor of Bangor (1888), 13 A.C., p. 241, at p. 253. Cf Ashby *v.* White (1703), 2 Ld. Raymond, p. 938; 3 Ld. Raymond, p. 323; Tozer *v.* Child (1857), 7 E. and B., p. 377; Halsbury: *Laws of England*, vol. xii. p. 312.

Justice Blackburn in one case, "that any direct pecuniary interest, however small, does disqualify a person from acting as a judge in the matter."[1] So strict is this rule that it has been held to apply in some cases even to a past interest.[2]

For the most part this obligation to be free from financial interest is an unwritten condition imposed by the common law. But occasionally it has been reasserted on the statute book. Thus, for example, the Income Tax Act, 1918, specifically prohibits Commissioners of Income Tax (who are judicial commissioners) from taking part in the determination of their own cases.[3]

Financial interest is, however, by no means the only form of interest from which a person performing a judicial act must be free. The Judicial Oath requires the judge to swear that he will "do right to all manner of people after the laws and usages of this Realm, without Fear or Favour, Affection or Illwill."[4] It is obvious that certain kinds of relationships might exist between the judge and the parties to a dispute which would make it at least doubtful as to whether he would arrive at a decision without favour or affection. Kinship would at the present time almost certainly be regarded as a form of interest in the proceedings from which a judge should be free. Even close friendship might in certain events amount to an improper "interest"

[1] The Queen *v.* Rand (1866), L R., 1 Q.B., p. 230. See also Short and Mellor: *Practice of the Crown Office* (2nd ed.), p. 44.

[2] R. *v.* Haim, 12 T.L.R., p. 323, where licensing justices who had sold their shares and resigned their directorships in a company seeking a licence were disqualified because "it could not be said that the granting of the licence was an unbiased judicial decision".

[3] See sec. 74 of the Act.

[4] Promissory Oaths Act, 1868.

in the proceedings. Any "tendency in favour of either party", is, in short, sufficient to disqualify the judge,[1] provided that it is of a tangible and substantial nature.

But substantial it must be. Circumstances from which a mere suspicion of favour may arise do not produce the same invalidating effect on the proceedings as a pecuniary interest—though why the love of money should be regarded as a more corrupting force than other more human emotions it is difficult to say, save that a financial interest is easier to trace than an interest arising out of affection or dislike. At any rate, we find it laid down that intimacy between a juror and one of the parties is not sufficient ground for setting aside a verdict;[2] and in one case which has not been overruled kinship by marriage between the judge and one of the parties to a suit was held not to be sufficient to disqualify the former. For, said the Court of Exchequer, "Favour shall not be presumed in a judge".[3] That occurred in the seventeenth century, a time when purity in public life was not greatly emphasised, and a different result might be expected in similar circumstances to-day. But nevertheless the rule holds that "a challenge to the favour", whether in the form of an alleged bias through kinship, friendship, or enmity with one or both of the parties, is not regarded with such prohibitive strictness as is a financial interest, however small, in the subject-matter of the proceedings.[4]

[1] R. *v.* Justices of Sunderland (1901), 2 K.B., p. 357.

[2] Onions *v.* Naish (1819), 7 Price, p. 203; Ramadge *v.* Ryan (1832), 9 Bing., p. 333; Halsbury: *Laws of England*, xviii. p. 255.

[3] Brookes *v.* Earl of Rivers, Hardres Rep. of Exchequer Cases, p. 503; Mich. 20 Carl. II.

[4] R. *v.* Rand (1866), L.R., 1 Q.B., p. 230.

Underlying this condition that the judge must be free from certain obvious and crude forms of interest in the case which he is called upon to decide, is the fundamental principle that a man cannot be judge in his own cause. Nor can he be both accuser and judge. "If there is on a tribunal anyone who is an accuser, and who, although he is accuser, acts also as judge", said Charles, J.,[1] "his presence on that tribunal is fatal to its jurisdiction." It is of no importance that had he been absent the decision would have been the same. His mere presence vitiates the decision. "The object of the rule", Lord Justice Atkin recently remarked, "is not merely that the scales be held even; it is also that they may not appear to be inclined."[2] This is one of the most deeply-rooted ideas in all systems of justice. So essential is it to English legal notions that it has been suggested that not even an Act of Parliament could make a man judge in his own cause and that a statute would be void if it attempted to do so.[3] Whether that is or is not sound constitutional law is not likely to be put to the test. In modern times the tendency has been rather in the other direction; and there are several recent measures on the statute book in which Parliament has applied the common law rule to whole departments of State. For example, in cases where a local authority proposes to acquire land compulsorily for housing purposes, and the

[1] R. *v.* L.C.C. *re* the Empire Theatre (1894), 71 L.T., p. 638.

[2] R. *v.* Bath Compensation Authority (1925), 23 L.G.R., p. 405, at p. 428.

[3] City of London *v.* Wood, 12 Mod, Holt, C.J., at p. 687; Day *v.* Savadge, Hob. 87; but cf. Lee *v.* Bude and Torrington Railway Co. (1871), L.R., 6 C.P., at p. 582; F. Pollock: *First Book of Jurisprudence*, pp. 268-269.

taking of it is resisted by the owner, the Minister of Health is required by Statute to appoint "an impartial person, not in the employment of any Government Department" to enquire whether the land is suitable and whether it can be acquired without undue detriment to the owners and adjoining landowners.[1] Again, where panels of assessors are required for investigations under the Merchant Shipping Acts, it is the Home Secretary who selects the men, and it is he also who recommends for appointment two of the Railway and Canal Commissioners, because it was thought that the Board of Trade and the Minister of Transport, who in the ordinary course of events deal with merchant shipping, and railroad transport, might in such enquiries be regarded as "interested parties", and should therefore have no hand in the appointment of the adjudicating tribunal.[2]

The common law rule has been carried to great lengths. A leading case occurred in connection with the issuing of music and dancing licences by the London County Council, which delegated to one of its committees the business of hearing applications for licences. This committee recommended by a majority that a certain licence should not be granted, and the applicant thereupon applied direct to the County Council itself. At the hearing, some of the members of the committee who had voted against the granting of the licence instructed counsel to oppose the application on their behalf before the full council. The councillors concerned were present at the hearing; and

[1] Housing, Town Planning, etc., Act, 1909, Schedule I.
[2] Sir E. Troup: *The Home Office*, p. 92.

although they did not vote, they did not "leave the bench". It was held later by the courts that their mere presence vitiated the whole proceedings.[1] This is obviously a highly elaborated refinement of the rule that no man can be both judge and advocate in the same case.

The difficulties which arise in certain circumstances when this principle is abrogated are described by Mr. Gerrard C. Henderson in his extremely interesting account of the working of the Federal Trade Commission in the United States. The Federal Trade Commission is an administrative tribunal set up to deal with certain types of economic activity of an anti-social character, such as deceptive and dishonest dealings or practices in restraint of trade. The Commission is an important body employing a large staff of officials. The first step takes the form of a complaint against the business man or corporation who is accused of the prohibited practices. This is issued on the report of a member of the Examining Division of the legal department of the Commission. If this report is approved by the Chief Examiner and subsequently by the Commissioners themselves, the latter appoint, on the recommendation of the former, an examiner from his department to conduct the hearing. In this way the rule that a man cannot be at once an advocate and judge is set aside; and as a result great difficulty has been experienced in maintaining an atmosphere of judicial impartiality. "The Commission", observes Mr. Henderson, "has not been able to overcome the handicap of a procedure which

[1] The Queen *v.* L.C.C., *ex parte* Akkersdyk (1892), 1 Q.B., p. 190. See also Frome United Breweries *v.* Bath Justices (1926), A.C., p. 586.

makes it both complainant and judge, and to impress upon its findings that stamp of impartiality and disinterested justice which alone can give them weight and authority." [1]

THE INTEGRITY OF ADMINISTRATORS

But it is not only the holders of judicial offices who are required to be free from the sort of bias which is presumed to arise when a man has a personal interest in the subject-matter of a case that he is called upon to decide or otherwise deal with. "Even administrators", Lord Justice Atkin remarked recently, "have to comport themselves within the bounds of decency",[2] and quite apart from statutes it is at common law a misdemeanour for a public officer, whether judicial or administrative, to accept a bribe as an inducement to show favour.[3]

The question of the extent to which a person engaged in public administration is required to be free from the various forms of bias which are sufficient to disqualify a judge has not been clearly thought out. Licensing justices are required to "act honestly" [4] when performing administrative duties; but what amounts to honesty in this connection has not been defined. In one case a borough council which had purchased an expensive licensed hotel for the purpose of a street improvement

[1] Gerrard C. Henderson: *The Federal Trade Commission*, pp. 83, 84, and 327-329.

[2] R. *v.* Bath Compensation Authority (1925), 23 L.G.R., p. 405, at p. 419.

[3] Lumley: *Public Health*, part i., p. 795; R. *v.* Whitaker (1914), 3 K.B., p. 1283.

[4] Leeds Corporation *v.* Ryder (1907), A.C., p. 420.

scheme made an agreement with a brewery company that the latter should pay money to the borough council in the event of licences being granted for certain of their premises, the corporation in return agreeing to close the hotel and not to make application for the renewal of the licence in respect of it. Some of the town councillors who had taken part in these negotiations were also justices of the borough, and in that capacity granted an application made by the brewery company. They also sat as members of the confirming authority. The court held that there was a likelihood of bias, and granted a writ of certiorari.[1] On the other hand, it has been definitely laid down by a former Master of the Rolls that the standard of bias to be applied in licensing questions must be one which "admits the right of Justices of the Peace to be at one and the same time objectors and judges".[2]

It may be presumed, however, that the law requires public officers, even though performing administrative acts, to be free from the more obvious causes of bias, such as a direct financial or other personal interest in the result, to the same extent as in the case of individuals carrying out judicial functions.

There are to be found, indeed, in many Acts of Parliament, no less than in those parts of the law which have been formulated under the influence of successive generations of common law and Chancery judges, various safeguards intended to prevent individuals entrusted with administrative duties

[1] R. *v.* Sunderland Justices (1901), 2 K.B., p. 357.
[2] R. *v.* Howard (1902), 2 K.B., 363; Collins, M.R, at p 376.

from being subject to personal bias arising from financial interest. Thus, the elected members of local authorities are disqualified from acting, and are liable to a heavy fine, if they are financially concerned in various ways in the expenditure of money by the local council [1]; and the law goes so far as to require that even trustees, the directors of limited companies, and other persons whose duties are often of a private nature, but in whose honesty the public has a concern, shall not be permitted to occupy positions in which a conflict between interest and duty is obviously likely to arise. But broadly speaking, the requirements of the law as to freedom from tangible forms of bias are less stringent in the case of persons called upon to perform administrative acts than is the case with those responsible for the conduct of judicial proceedings.

As I hope to show in a later chapter, judicial impartiality is a quality of mind which depends on more subtle considerations than the application, however strict, of the principle that a man may not be judge in his own cause. Judicial fairness involves psychological elements far beyond the reach of rules which touch mere externalities, and is not secured by prohibitions which only prevent a man from having a financial or an emotional interest arising from kinship in the case he is trying. But first things come first; and there is no need to underrate the rules which we have described in the preceding pages. They have at least laid the foundation for that integrity of mind which we have come to expect from all who perform the judicial function.

[1] Municipal Corporations Act, 1882, sec. 12; Local Government Act, 1894, sec. 46.

THE JUDGE MUST ACT PERSONALLY

One noteworthy characteristic of judicial functions exercised in courts of law is the fact that the work of a judge is essentially personal to himself. The great majority of public officials may delegate at least part of their work to others, even though the responsibility for it cannot be shifted; but one of the conditions which attaches to formal judicial proceedings is the rule that the judge shall himself personally hear and determine the matter to be decided. A judge who absented himself habitually from court and installed a friend as a permanent *locum tenens*, or who handed over part of the trial to a subordinate, would not be permitted to remain on the bench. The award of even an arbitrator may be set aside for misconduct if there has been an improper delegation of duty.[1] The Lord Chancellor himself, despite multifarious other duties, is unable to receive assistance in his judicial capacity beyond "the purely ministerial work of searching for references or finding books".[2]

In this respect the office of judge presents a sharp contrast to that of administrator. The typical administrator is a single link in a long chain of delegated work, capped at the top by the responsible Minister as supreme delegator. No one dreams for a moment that the Home Secretary or the Postmaster-General is personally concerned in the

[1] Russell: *Arbitration and Award* (11th ed.), p. 205; Haigh *v.* Haigh (1861), 31 L.J. (Ch.), p. 420; Newry *v.* Enniskillen Railway Co. (1856), 8 De. G. M. and G., p. 487.

[2] Report of Machinery of Government Committee (of which Lord Haldane, an ex-Lord Chancellor, was Chairman), Cd. 9230/1918, p. 65.

multitude of good deeds and social sins which are committed daily in his name. The right to delegate lies at the very heart of the modern system of public administration, and the business of government would be impossible were the King's Ministers not able to shift the burden of nearly the whole mass of executive functions which devolves on their shoulders. And of course the process of delegation takes place no less actively within the hierarchy of the civil service itself. When we receive a letter from Whitehall telling us that the writer " is directed by the Minister of Labour to say that he has decided " something or other, we know that in all probability the Minister himself has never heard of the matter at all. Unless it be a question of the first importance it has been disposed of by some assistant secretary or principal clerk or less exalted underling. But when a magistrate observes that he has decided to determine a case in a particular direction, we know that it is he, and he alone, who has personally arrived at the decision.

The courts of justice form, it is true, a hierarchical system of a well-defined type. But that hierarchy differs widely from the hierarchy existing in the administrative service. For in the judicial hierarchy each link in the chain of courts is an autonomous unit free to do its own work in its own way, provided it keeps within the limits of a recognised process. But in the administrative system other conditions prevail. The kind of work which is to be done, and the manner of doing it, is ordered from above, in all cases save those of the highest ranks of officials. The authority of the higher courts is exerted over the *decisions* of the judges of

the inferior courts and not over their persons; whereas the authority of an administrator over his subordinates is a personal jurisdiction which (subject only to the brooding solicitude of the Treasury) covers every aspect of the industrial life of the latter.

THE *LIS INTER PARTES*

The distinguishing feature of the judicial power, said Bentham,[1] is that an interested party must come to the judge and require him to determine a matter in controversy; and the party to whom the order of the judge may prove detrimental must have the right to oppose. Here we have an analysis of what is involved in a *lis inter partes*.

The idea of a suit between parties is inseparably bound up with the conception of the judicial function. Since time immemorial the judge has always been depicted as a third party, aloof and impartial, holding the scales evenly between impassioned parties to a dispute, a Solomon before whom two mothers claiming possession of but a single babe might lay their case. In English law even a prosecution for murder takes the form of a dispute between the king and one of his subjects, the prisoner, both of whom submit to the jurisdiction of the court.

An attempt has been made on many occasions to make the existence of a suit between parties the conclusive test of judicial functions. Thus Professor J. C. Gray[2] thinks that the distinction between

[1] *Works*, vol. iii. pp. 198-199.

[2] *The Nature and Sources of the Law*, p. 309, cf. Philips *v.* Bury, 2 T.R., pp. 346-348, Holt, L.C.J.

administrative and judicial functions, when exercised by the same person, is illustrated by the capacities in which the visitor of a college acts. The visitor may make general visitations for inspection purposes whenever he chooses, and he is then acting administratively. He may also hear complaints from members of the college against the master and fellows, if called upon to do so, and when deciding a controversy in this manner he is then performing a judicial function. Lord Herschell, in a leading case in the House of Lords, observed in a similar way that justices of the peace, in deciding whether to grant liquor licences, are not acting judicially because there is no *lis inter partes* before them. Persons objecting publicly to the grant of a licence are not, in his view, parties to the proceedings in any real sense. The question, he said, is not one *inter partes* at all. The justices of the peace have an absolute discretion to determine, in the public interest, whether a licence ought to be granted, and any member of the public may object on public grounds apart from any individual interest of his own. The applicant seeks a privilege, and the citizen who objects "merely informs the mind of the Court to enable it rightly to exercise its discretion" whether to grant that privilege or not. A decision that a licence should not be granted is a decision that it would not be for the public benefit to grant it. "It is not a decision that the objector has a right to have it refused. It is not, properly speaking, a determination in his favour."[1] The objector should not, therefore, be regarded as the other "party", unless, indeed, the public as a

[1] Boulter *v.* Kent Justices (1897), A.C., p. 556, at p. 569.

whole be regarded in that light. In the ordinary sense there is no *lis*, no dispute between parties personally interested in the decision, and no determination in favour of one side. A similar point of view prevailed in the United States, where the object of evidence in licensing applications was held to be not merely the establishing of facts necessary to prove private rights (for no one possessed any property in the right to sell liquor) but " to inform the conscience of the Court, so that it could act intelligently and justly in the performance of a public duty ".[1]

There is no doubt that a suit between parties is a characteristic commonly present in judicial functions performed in courts of law. But it is possible to make too much of it. We cannot say rigidly that without a *lis inter partes* there can be no judicial act ; and that wherever the *lis* and the *partes* exist, there also will be found the judge—unless we are prepared to throw overboard Lord Herschell's narrow interpretation of those terms. To say that the only person capable of being a " party " to a controversy is a private person or a corporation seeking to enforce individual rights, is to advocate a conception more fitted to the first quarter of the nineteenth century than to the second quarter of the twentieth. We must now regard the public as very definitely a " party " to certain kinds of proceedings which are decided judicially. It was, indeed, the failure of the judicature to endow the general public with an enforceable interest in matters where a regard for the social good is of the first moment

[1] Raudenbusch's Appeal, 120 Pa. 342, 14 Atl. 150 ; Supreme Court of New Jersey, 1902 ; Dodd *v.* Francisco, 68 N J. Law 490, 53 Atl. 219.

that led to the development of the Administrative Tribunals which we shall describe later.

We have, again, to remember that a large amount of judicial work is concerned with *ex parte* applications, where there is but a single suitor before the court. Moreover, a great part of the jurisdiction of the Chancery and Probate Divisions of the High Court in regard to the administration of trusts, wills, and other matters is exercised by the court without the judge being required to adjudicate over anything in the nature of a dispute between conflicting parties. Often it is merely the permission or declaration of the court which is sought by an executor or trustee; yet it is difficult to suggest that such proceedings are not judicial.

On the other hand, if we would keep to a true view of the judicial function, we must include within its ambit the activities of all those persons other than judges who have at one time or another to decide controversies great or small, even where no legally enforceable right is concerned. Everyone must to some extent feel himself to be a judge when his decision is sought by two friends in momentary dispute, whether they be a couple of business men who have fallen out about a contract, or a boy and girl quarrelling over a toy. The question whether the rights in issue are legal rights or moral rights or natural rights (if such exist!) is immaterial. There are more judges under the high heavens than those who sit in courts.

On this view, then, we can conceive a *lis inter partes* existing whenever a person finds himself called upon to decide a controversy between others, whether he is an administrative

official, or a business man, or a peacemaker among friends.

But, we must note, an essential element is represented by the passivity of the judge, who remains inactive until called upon to exercise his jurisdiction. It is on the motion of one or both of the parties that the judicial process is put in train. The judge himself is powerless to initiate the proceedings, to act *proprio motu* without being called upon first. It is in this voluntary submission to the decision of the tribunal by at least one of the parties that the essence of the judicial function lies.[1] Without it, no stable judicial system is possible; for a decision imposed on those who do not seek it by a body to which there is no submission is not felt to be justice at all. It was a dim realisation of this truth that prevented the idea of trying German "war criminals" by a court to which Germany had made no voluntary submission, from being carried to a farcical conclusion. It is a commonplace to say that the problem of keeping the peace by means of settling international disputes by judicial methods depends in the main on obtaining a submission to the tribunal on the part of the nation states concerned.

This brings us to what is a fundamental distinction between courts of law and unofficial tribunals. In the case of an official court, it is the submission of the plaintiff or prosecutor alone which is voluntary; the submission of the defendant in

[1] It may be said, of course, that few persons accused of crime submit voluntarily to the decision of the court They are seized and brought before it, and its sentence is enforced upon them willy-nilly. This is true; but it is also true to say that everyone living in a civilised community by implication submits to the prevailing criminal code and the courts which enforce it.

civil cases, or the prisoner in criminal trials, is compulsory when the judicial process has once been set in motion. In the case of most unofficial tribunals the adjudicator cannot function unless both parties submit voluntarily.

In this respect the administrator differs fundamentally from the judge. The executive official, be he inquisitorial, or regulatory, or originative, possesses an inherent right to initiate action by his own motion. Administration without initiation is almost unimaginable in present circumstances. The administrator does not originate continuously; nor does he always originate wisely or effectively. But it is nevertheless an undeniable fact that every administrative body has what an American writer calls "a continuing responsibility for results"[1] of a sort which is unknown to the judge. "It must ferret out violations, initiate proceedings, and adopt whatever proper methods are necessary to enforce compliance with the law." This duty of spontaneous, self-motivated activity may be contrasted with the enforced passivity of the judge, who must wait, spiderlike, till someone enters the web of his jurisdiction. Judges are, as a matter of fact, actually at least as fully occupied as administrators; but that does not prevent what we have said above from being a true analysis.

THE RIGHT TO BE HEARD

Of all the characteristics of judicial functions none is more essential than the right to a hearing. The safeguards of civil liberty find expression in

[1] Gerrard C. Henderson: *The Federal Trade Commission*, p. 91.

few principles of greater importance, according to English legal notions, than that embodied in the maxim that every man is entitled to his day in court. In this respect English law is rather sharply differentiated from the various brands of Roman law prevailing on the Continent, where much of the work that is carried out here in open court is done by the method of interchange of papers between the judge and the parties.[1]

According to English ideas the judge is under an absolute duty to fix a time and place for the trial, presumably at a convenient spot and reasonable hour. Of course in the normal course of events the trial takes place in the public court buildings during regular hours, but the existence of a well-established routine need not blind us to the underlying obligation.[2]

In that given place and at that given hour the litigants have a right to see each other and to confront their judge, enthroned amid the trappings of the law. Both sides of the case must be heard, and the entire trial conducted in a way which should enable any intelligent stranger present in court from the beginning to follow it. The extent to which this right of access to the individual mind of the judge is prized will be shown in a later chapter when we come to describe the litigation which has circled around the point.

Each party has a right to hear what is put forward by the other party in support of his case, in order that it may be controverted if possible, and

[1] Cf. Sir Maurice Amos: "A Day in Court at Home and Abroad", *Cambridge Law Journal*, June 1926.

[2] Russell: *Arbitration and Award* (11th ed.), *passim*.

the facts on which the argument relies be shaken in cross-examination. Sir Edward Troup, writing of the duty performed by the Home Secretary, before the Court of Criminal Appeal was set up in 1908, of reviewing criminal cases as a final court of appeal, observes that the chief disadvantage arising from the old arrangement was that " there being no public hearing, no one knew what evidence was received or why alleged evidence was rejected ".[1]

In all the formal courts of justice the rule obtains that the proceedings must be public.

The necessity for maintaining what is called open court overrides the power of the court to regulate its own procedure which otherwise exists, and yields to no lesser consideration than the paramount duty of the court to see that justice is done. A mere belief by the judge that a hearing *in camera* is desirable in the interests of decency or morality will not be sufficient to enable the court to sit behind closed doors.[2] This principle that publicity must prevail in judicial activities refers primarily to proceedings in court, but it is applicable also to many other judicial acts of a less formal nature. Arbitrations are often not open to the general public, but an award may be set aside if the arbitrator excludes persons entitled to be present.[3]

Both the right to a hearing and the condition that publicity shall prevail are characteristics peculiar to the judicial process. Most legislative bodies throw open their deliberations to the general public ; but it is rare indeed that administration can be observed in the making, as it were, save by those with a

[1] *The Home Office*, pp. 58-59. [2] Scott *v.* Scott (1913), A.C., p. 417.
[3] Russell, *op. cit.* p. 205.

special claim to favour.[1] If we are negotiating a matter with the Treasury or a local Board of Guardians, or other administrative authority, we should not claim to be entitled as of right to see the particular tyrant who is to declare our fate; nor to witness the inner workings of the machine as it grinds out a decision in the matter which concerns us. The practice of giving members of the public official interviews, and of conducting business in the course of them, is one of the most striking changes in civil service methods which has taken place in recent years. But the method is still far from widespread; and an interview with an official is an occasional privilege and not a right.

ACCORDING TO THE EVIDENCE

The hearing of the case, when it comes before the court, must be conducted in accordance with a known and established procedure. We shall defer until a later chapter consideration of the psychological processes which are involved in the exercise of the judicial function; but we may notice here certain characteristics in the nature of formal rules. The most obvious of these is the one which prescribes that the decision of the court must be in accordance with the evidence. Jeremy Bentham went so far as to denote the necessity for having proof of the facts on which a claim is founded as one of the

[1] In a recent case it was expressly decided that the granting of a certificate by the Lord Lieutenant of a county that it is necessary or expedient for the War Office to take land required under the Defence Act for military purposes is not a judicial but an administrative act; and the landowner has *therefore* no right to be heard in protest (Hutton *v.* Attorney-General (1927), 1 Ch., p. 427).

three distinguishing features of judicial power,[1] although this is actually a comparatively modern development.[2]

The stipulation that the verdict must be "in accordance with the evidence" is a very vague expression; and unless it can be reduced to quantitative terms, does not in itself convey a great deal of meaning. A judge may not decide that a particular set of facts exists without *any* evidence; but the amount of evidence which is sufficient to support a decision in any given direction may be very small. Nevertheless, an important feature of court proceedings is the rule that what is sought to be proved must be established by evidence given in open court in the presence of both parties. Secret information may not be received from one side or another; the quiet tip behind the other fellow's back which is regarded with such favour in financial circles, the special information received secretly which may make a fortune overnight in business, is overwhelmingly distasteful to the common law; and an arbitrator who indulges in secret information from either side is liable to removal or to have his award invalidated. Nor in the ordinary course of events may evidence be taken on behalf of one party in the absence of the other.[3]

The taking of evidence consists in the process of establishing the existence of certain facts believed to be necessary for the proper determination of the question to be decided. The methods of proof comprise, in the case of the courts of law, an elaborate

[1] *Works*, vol. iii pp. 198-199.

[2] Edward Jenks: "According to the Evidence" in *Cambridge Legal Essays*.

[3] R. *v.* L.C.C., *ex parte* Commercial Gas Co. (1895), 11 T.L.R., p. 337.

code of rules, all of which are ultimately dependent on sense-perceptions. The facts so sought to be proved may consist of almost any secular phenomenon, from the motives which induce a man to leave his money to a stranger to the position of a lamp-post on a slippery highway. Often the underlying sequence of causes which have produced a particular event is ignored, or ruled out as inadmissible, and the mere resulting effect alone taken into consideration.[1] But this varies with the circumstances in each case.

What we are here concerned to observe is that judges are in general much more closely confined to the evidence than administrators. That is to say, it is assumed that they must not "notice" or be influenced by any fact connected with the matter under consideration which is not formally proved in evidence. Private information or an acquaintance with matters of common knowledge, apart from the minimum acquirements necessary to enable the adjudicator to receive the testimony offered to him in the course of the proceedings, is supposed to be prohibited so far as he is concerned.

One of the most interesting chapters in the history of English law is the change in the position of the jury, which in the eighteenth century became transformed from "a body of neighbours expressly invited to speak of their own knowledge as to certain facts" to a group of citizens sworn to draw logical conclusions from facts of which they have no personal knowledge, but which have been testified

[1] A practice not confined to courts of law. George Eliot wrote: "We judge others according to results; how else?—not knowing the process by which results are arrived at" (*The Mill on the Floss*, book vii. ch. ii.).

to by the witnesses examined before them.[1] Professor Jenks very significantly refers to the early body as the "administrative jury", and points out that much of its work consisted in answering administrative enquiries, often of a fiscal character, directed to it by royal officials.

The position of the jury appears, indeed, to have become assimilated in this respect very closely to that of the judge. The jury may, it is true, still make use of its "general knowledge" concerning the facts of a case, though this is seldom done nowadays in practice.[2] But even then a juror is under a duty to declare his knowledge in open court on his juror's oath and not to state it privately to his colleagues.[3] When provision was made in the Housing Acts for the compulsory acquisition of land by a local authority and it was considered desirable that the arbitrator appointed to assess compensation should "act on his own knowledge and experience" rather than on the bare evidence tendered him in his official capacity, it was necessary for a statute to give him power to do so in those very words.[4]

The administrator is, of course, in a much freer position so far as the evidence is concerned. He may act without evidence, he may act against what evidence there is, or accept as evidence testimony of a kind which would not for a moment be admissible in a court of law. Yet it is nevertheless

[1] E Jenks: "According to the Evidence" in *Cambridge Legal Essays*; J. B. Thayer: *Treatise on Evidence at the Common Law.*

[2] R. *v.* Rosser (1836), 7 C. and P., p. 649, Parke, B.

[3] Halsbury: *Laws of England*, vol. xviii., p. 285; Duncomb: *Trials per Pais*, c. 14, citing Plowden's Commentaries.

[4] Housing, Town Planning, etc, Act, 1909, sched. i. (8).

true that administrative authorities again and again find it necessary to establish standards of evidence which must be satisfied before action is evoked. For example, the British Foreign Office will not issue a passport unless they are satisfied that the applicant is a respectable person fit to receive diplomatic protection abroad if required. The person seeking a passport is required to produce evidence of a particular kind testifying as to his respectability; and the decision of the Controller of the Passport Office is arrived at virtually "according to the evidence", though in law there is no necessity for the Foreign Office to be guided by that or any other system.

THE CASE IN HAND

One noteworthy characteristic of judicial function is the rule that, in theory at all events, only the immediate issue in hand shall be determined. Professor Dicey regarded this as an indispensable element of judicature; for, speaking of the judges of the Supreme Court of the United States and the manner in which they control the action of the constitution, he remarks "they nevertheless perform purely judicial functions, since they never decide anything but the cases before them".[1]

The strength of the English system of law lies, according to Dean Pound, in this very preoccupation with the particular controversy under discussion.[2] Unlike the Roman law, it resolutely refuses to take any interest in the logical development of abstract conceptions.

[1] *Law of the Constitution* (8th ed.), p. 159.
[2] *The Spirit of the Common Law*, p. 3.

It is the case in hand, in short, which holds the centre of the stage in judicial proceedings. Each case must, in theory at least, be judged on its own merits; and although the judge does in practice lay down general rules which will decide future cases, no future case may actually be determined unless and until it reaches the courts. Practising lawyers, of course, follow the leading cases in the law reports and advise their clients in accordance therewith, secure in the certain knowledge that the principles laid down therein will be followed when occasion arises; but no judge may in law determine a class of case in advance,[1] or decide the issue in a single instance until the matter comes before him in open court. A case must not be a *chose jugée*, in theory at least, however certain the result may be in view of the principles laid down in previous cases. The administrator, on the other hand, may deal with whole classes of cases at a stroke and dispose of a thousand instances with but a single wave of the pen.

A FINAL DECISION

The chief reason why we maintain an elaborate system of law courts is, when all is said, in order that some acceptable means may exist for arriving at a decision which shall finally conclude the question under controversy once and for all. It is obvious, therefore, that one of the main characteristics of the judicial function as exercised in courts of law is that the decision of the tribunal shall finally determine the matter. The extent to which the decision of a particular court is final varies largely

[1] Auditor Curle's Case, Hil. 7. Jac. I. Coke Reports, xi. p. 3.

according to circumstances. The finding of a court of first instance on questions of fact is usually final in England; the decision of the court on questions of law is occasionally final, but is nearly always subject to a right of appeal to the higher courts. But whether or not in any given case it is necessary for a litigant to ascend the whole hierarchy of courts in order to attain finality is a mere detail, for the element of conclusiveness is in any event inherently rooted in the judicial process. The position is, indeed, that the decision of a judicial body acting within its own jurisdiction is final unless and until it is appealed against by the dissatisfied party, according to whatever procedure may be prescribed.

The basis of the conclusiveness of judicial determinations is the fact that behind the judge's authority to decide stands the power of the executive to enforce. In the great majority of cases, other than criminal trials resulting in punitive sentences, the mere knowledge that the organised police power of the community looms in the distance behind the words of the judge is sufficient to effect a carrying out of the judgment of the court.[1] But it is the knowledge that the determination of the judge will be enforced if need be by the organised civil force of the community that gives to a judicial decision its special attribute of finality.

Yet the power to enforce is not an essential mark of the judicial function. The Supreme Federal Court of the United States is the most important

[1] That is, so far as is practicable. We must obviously exclude cases where damages are awarded against a man who has not the means to pay them.

tribunal in the world. Its decisions concern matters of the deepest import to civilisation and are widely respected throughout the United States; but it possesses no constitutional power to enforce its decisions on member states of the Union. At least, up to 1916, the court, which had by then decided over forty cases in which state sued state, had not only never attempted to exert power over a state, but had invariably declared itself to possess no coercive power. Nevertheless, during the hundred and forty years which have elapsed since the Supreme Court was set up, all kinds of inter-state controversies involving territorial and economic questions have come before it to be decided; and peaceful acquiescence and obedience to the court's decree has been the rule.[1] In 1918, for the first time, Chief Justice White, in the *West Virginia* case, declared that "judicial power essentially involves the right to enforce". But he was ignoring the past history of the court in one important respect. In England, again, the Industrial Court, which was set up in 1919 to adjudicate upon various kinds of controversies concerning wages and conditions of employment arising between employers and workers, possesses in most cases no powers to enforce its awards compulsorily. Nevertheless, the awards of the Industrial Court have so far invariably been put into operation, and the court is building up a definite body of economic jurisprudence which is applied effectively without any external sanctions.

The declaration by a court of what the correct

[1] See an excellent article entitled "Power to Decide, None to Enforce" by James N. Rosenberg in the *Nation*, New York, December 9, 1925.

determination of a controversy should be according to the dictates of the law is the essential part of the judicial function; and we may distinguish it, for purposes of analysis, from the application of the sanctions of the law. One can imagine, indeed, a society (situated on what Mr. Keynes would call "the extreme left of celestial space") in which all sanctions were abolished and the conclusions of the judges invariably put into operation by the voluntary action of the persons affected. Such a community would have to consist of "just men made perfect" to a higher degree than any of which we now have knowledge; but the judges would none the less be performing true judicial functions despite the fact that the power to enforce had ceased to exist.

In the ordinary business of administration it appears at first sight as though there were a finality about many administrative decisions no less complete than that which attaches to judicial determinations. We are assessed to income tax, and pay without more ado; the local authority decides to build a school, and puts its decision into practice with what appears an inexorable resolution; the London County Council declares its intention of demolishing Waterloo Bridge, and there seems to be an end to the matter, so far as the law is concerned.

On a closer examination, however, it can be seen that administration according to law involves one very important factor which qualifies the finality of the decisions of an administrative body; namely, the liability to review by the courts in all cases save where that is excluded by Act of Parlia-

ment. Well-established principles of common law and equity permit a judicial review of administrative determinations whenever any question arises as to jurisdiction or abuse of power. Normally there is a judicial review on any question of law; and often a review on question of fact as well.[1] In other words, we can compel the administrative body concerned to produce in the courts the legal warrant in virtue of which it claims the power to assess us to income tax, to build the school with our money, to tear down the masterpiece which Rennie flung across the Thames. Furthermore, in the case of a judicial function, the force and validity of a decision depends not only on the fact as it actually exists, but on the fact as it has been determined to exist by the judge. That is to say, liability may be imposed by the mere decision, regardless of whether it be erroneous in law or in fact. It is otherwise in the case of administrative power. For then, "if the existence of such a power depend upon a contingency, although it may be necessary for the officer to determine whether the contingency has happened, in order to know whether he shall exercise the power, his determination does not bind", and the happening of the contingency may be questioned in an action brought to test the legality of the act.[2]

We can see, then, that where an administrator is given power, by statute or common law or in virtue of the royal prerogative, to do certain things, his actions may be questioned on the ground that he

[1] Cf. Ernst Freund: "The Right to a Judicial Review in Rate Controversies", 27 *West Virginia Law Quarterly*, p. 211.

[2] R. (Wexford County Council) *v.* L.G.B. (1902), 2 I.R., p. 349, Palles C.B.

has acted in excess of his power.[1] (We shall see later that there are certain other considerations which limit his discretion in various ways, but we are not concerned with those at the moment.) That may not seem a very powerful reservation to the conclusiveness of administrative decisions. It will not enable a man to get a passport issued to him when the Foreign Office is prejudiced against him because of his political views; nor enable an advanced dramatist to get his play passed by the Lord Chamberlain if that official happens not to believe in free trade in progressive ideas.[2] But in a very large number of cases it does ensure that before the organised civil power of the community is put into force at the behest of the administrator in the execution of public business the whole question is potentially open to review by the courts. There is a real difference between this and the finality of judicial decisions.

CONCLUSION

We have endeavoured in this chapter to give a brief outline of some of the main characteristics of judicial functions as exercised in courts of law; and to compare and contrast those characteristics with the analogous features of administrative functions. We do not pretend to have given a complete description. A very large number of details have been omitted, such as the position occupied by the jury, the inherent right of self-regulation belonging

[1] Hall *v.* Manchester Corporation (1915), H.L., Knights, L.G.R. vol. xiii. p. 1105, at p. 1111.

[2] Cf. Sir E. Troup: *The Home Office*, p. 200.

to courts of law,[1] their special power of imposing the payment of costs on the parties to the proceedings,[2] and so forth. In particular, nearly all reference to formal rules of procedure has been omitted.

The aim has not been to give a description, complete in every meticulous detail, of the institutional features of the judicial system, but rather to present a broad outline of the leading characteristics of the judicial function, and to omit unessential details from the picture altogether. The purpose we have had in mind has been to crystallise the essential characteristics of what may be called the formal judiciary—that is, the conventional courts of law—in order that the nature of the Administrative Tribunals which we are about to describe may clearly stand out. We must understand the normal before we can comprehend the abnormal. In the following chapter we propose to describe the mass of official or governmental tribunals which have grown up outside the court system and which constitute, in our contention, a revival of administrative law in England.

But perhaps I may anticipate an objection which might well be raised by a careful observer of legal and political institutions. What have been described in the foregoing pages, it might well be said, are the outward features of the judicial process. The fundamental part of that process has been left out altogether. Not a word has been said about the inner working of the process: the application

[1] R. *v.* Denbighshire Justices (1846), 15 L J. (Q.B), p. 338.

[2] Society of Accountants in Edinburgh *v.* Lord Advocate (1924), W.C. and Ins. Reports, p. 285.

of a body of law by a mind with a special outlook. A discussion about courts of law without reference to the judicial mind which is enthroned in them may be likened to a presentation of Hamlet without the Prince of Denmark.

The answer is: all in good time. First the flesh and then the spirit. First the organs and then the mind of justice. If the reader will bear with me, he shall in due course have a discussion concerning the judicial mind in operation both in courts and outside of them.

CHAPTER III

ADMINISTRATIVE TRIBUNALS

The Railway Courts — The Judicial Functions of the Minister of Health — The London Building Tribunal — The Judicial Powers of the District Auditor — National Health Insurance Tribunals—Tribunals for Unemployment Insurance—The Judicial Functions of the Board of Education — The Judicial Functions of the Board of Trade—The Judicial Functions of the Minister of Transport—Pensions Tribunals—The Attitude of the Judicature—The Arlidge Case—The Commission on Awards to Inventors—The Law Officers and Patent Appeals—The War Compensation Court—Conclusion

IT has already been pointed out that the social legislation of the past fifty years has introduced an entirely new element into the British Constitution, or, to state it more accurately, has reintroduced an old element in a new form. That development consists in the placing by Parliament of a large and increasing number of judicial functions, essentially similar in type to those which normally go to be decided in the various courts of law, in the hands of the great departments of State, or under the jurisdiction of tribunals controlled directly or indirectly, or appointed by, executive ministers of the government. As we have already seen, there is nothing novel in the spectacle of a variety of judicial and administrative, and even legislative, functions being placed on the complacent shoulders of a single

representative or nominee of the central government, such as the justice of the peace; but it will be remembered that the judicial duties of that officer, and to a large extent his administrative acts as well, were at all times subject to review by the Court of Quarter Sessions, and ultimately by the King's Bench,[1] and the justices were accordingly never really outside the potential control of the judicature.

What we now find, however, is that large judicial duties of an important character have been given, not to persons holding judicial office, not even to known and ascertainable individuals, but to vast departments of the State, huge administrative organisations employing thousands of anonymous civil servants. In some cases the responsible ministry does not itself perform the judicial function in question, but is empowered to set up and regulate the tribunal which is to do the work. This does not affect the principle involved, however, because the vital feature of the whole arrangement is the fact that there is no appeal to the regular courts of law.

This fact distinguishes the tribunals which we are about to describe from the bodies of so-called judicial commissioners which are sometimes regarded, somewhat erroneously, as constituting a system of administrative law. In the case of the Commissioners of Income Tax, for example, or the Railway and Canal Commission, there is an appeal to the High Court of Judicature on questions of law, and it is only on questions of fact that the

[1] F. J. Goodnow: "The Writ of Certiorari", 6 *Political Science Quarterly*, p. 531.

Commissioners' decision is final. In order to make the distinction clear we shall describe shortly the composition and powers of the Railway and Canal Commission and certain cognate bodies.

THE RAILWAY COURTS

The Railway and Canal Commission is an interesting example of a body whose structure and functions lie midway between those of a court of law on the one hand and an administrative tribunal on the other. The Commission came into existence at a time when the strict legalism of the mid-Victorian era was beginning to yield to certain social necessities to which the industrial revolution gave rise, but before public opinion had become reconciled to a type of administrative tribunal which subsequent legislation has produced in abundant measure.

The Railway Commission arose in the first place as a result of the great amalgamating movement which took place among the British railway companies during the second quarter of the nineteenth century. It was feared by Parliament that the increased monopoly which resulted from amalgamation would deprive the public of the good service and low rates which competition, according to prevailing notions, was certain to secure. Parliament accordingly passed in 1854 the Canal and Railway Traffic Regulation Act, which laid down the principles that every railway company should afford proper facilities for forwarding traffic, and that no preferences of any kind should be given. The Act sought to indicate, if not to define, the duties

and obligations of the railway companies, and to establish machinery to enforce these obligations and duties. Every railway or canal company was to "afford all reasonable facilities for the receiving and forwarding and delivering of traffic" on their system, and for the return of rolling stock; and no company was to "make or give any undue or unreasonable preferences or advantage" to any person or firm or class of traffic, or to manifest "any undue or unreasonable prejudice or disadvantage" towards anyone. Reasonable facilities for receiving and forwarding traffic on continuous lines owned by separate companies were to be granted, so that "all reasonable accommodation" might at all times be afforded to the public.[1] Where these conditions were not fulfilled, complaints might be made to the Court of Common Pleas, which might issue an injunction to restrain the continuance of the grievance, and enforce the same by means of severe penalties. The court was to make such enquiries as it thought fit, and the judge might be assisted in the investigation by engineers, barristers, and other experts.

It was at first intended that, where a complaint was made out to the satisfaction of the High Court, the matter should be referred to the Board of Trade, which should then propose a scheme for the proper working of the railway, to be enforced after approval by the court. But this idea, which was included in the Bill as originally drafted, was struck out through the influence of the railway companies and the matter left entirely to the jurisdiction of the court.

A few test cases were brought before the courts

[1] 17 and 18 Vic. c. 31.

under this statute by important business undertakings whose interests were injuriously affected by the lack of adequate traffic facilities. But, as the Select Committee on Railway Companies Amalgamation reported in 1872, "complaints have been made that the difficulty and expense of taking a case before the Court of Common Pleas are such as to deter any but wealthy traders who have a great interest, from contesting cases with the powerful railway companies; and questions of undue preference are often so technical, so dependent on special circumstances of railway management, and so closely connected with questions of 'due facilities' as to lead your Committee to the conclusion that even this part of the Act has not been as much brought into play, as it would have been if speedy and summary reference could have been made to a tribunal having practical knowledge of the subject".[1]

The committee thought that the functions committed to the Court of Common Pleas were so foreign to the ordinary functions of a court of justice that the failure of the Act was not a matter for surprise.[2] One thing appeared obvious to them from the enquiry which they had made, namely, that it was "difficult to provide any fixed or self-acting rules which will, through the medium of self-interest, or of the ordinary action of law, do what is necessary to protect the public".[3] Every witness had suggested that there should be an appeal to some board or tribunal, which should settle

[1] Report from Joint Select Committee on Railway Companies Amalgamation, Parliamentary Papers, 1872, vol. xiii., Reports from Committees, p. lxvii.

[2] *Ibid.* p. lxviii.

[3] *Ibid.* p xcv.

disputes and achieve, in fact, "what self-interest or the law itself cannot do".[1]

The committee consequently recommended that a new body of commissioners should be set up. The commissioners, who were to be not less than three in number, were to include an eminent lawyer and a person acquainted with railway management. They were to see that rates and fares were duly published and adopted by the companies; to investigate complaints of unfair differentiation as between traders or areas; to see that proper facilities were given for the interchange and forwarding of traffic; to enforce the maintenance of the canals owned by the railway companies and to control the tolls on such canals, and to settle various classes of disputes arising between railway companies and their users. The procedure of the commission was to be as simple and inexpensive as possible.

In the following year these proposals of the committee were embodied in the Regulation of Railways Act of 1873; and the jurisdiction of the courts under the Railway and Canal Traffic Act, 1854, and other railway statutes was vested in the three commissioners and two assistant commissioners who were to be appointed under the statute.

In 1888 another statute was passed, and the existing commissioners were superseded by the present Railway and Canal Commission. This body consists of two commissioners (one of whom must have had experience in railway business) appointed by the Crown on the recommendation of the President of the Board of Trade, and a third commissioner, who is a judge of the High Court,

[1] *Ibid.*

nominated in England by the Lord Chancellor.[1] The Commission exercises all the powers vested in its predecessors under the Act of 1873 and later statutes, and it thus exercises a jurisdiction in all disputes concerning the legality of tolls and rates for merchandise traffic or terminal charges; and the commissioners also determine complaints in respect of undue preference or traffic facilities, and decide questions relating to accommodation works.[2] Proceedings may be taken by anyone complaining of any violation or contravention of the law relating to traffic facilities or undue preference, or by anyone else affected by a matter over which the Commission has jurisdiction. Complaints may also be made by representative bodies such as local authorities, justices of the peace in Quarter Sessions, chambers of commerce, and so forth. Bodies of this kind need not show themselves aggrieved in the sense of having suffered a legal or other injury; and they can appear in opposition to a complaint where the commissioners think that they represent interests which are affected.

There are several features of the Railway and Canal Commission which give it the appearance of an administrative tribunal. Thus, there is no appeal from its finding on any question of fact or any matter respecting the *locus standi* of a complainant. It has wide power to hear and determine controversies between parties who are contending on standards of transport service rather than seeking to maintain legally enforceable rights of property

[1] In Scotland the *ex-officio* judge is nominated by the Lord President of the Court of Session, and similar local arrangements are also made in Northern Ireland.

[2] Halsbury: *Laws of England*, vol. ix. p. 222; vol xxiii. p. 753.

or person. Many of the questions it has to decide, such as the fairness of charges, are matters of administrative policy rather than definite questions of law. The qualifications of two of its members are administrative or commercial rather than legal or judicial in the ordinary sense. Its procedure is less formal than that of a court of law.

But despite these characteristics the Railway Commission has, since 1888, borne a far closer resemblance to a court of justice than to an administrative tribunal. The Act of 1888 not only provided that a judge of the High Court should *ex officio* be a member of the Commission, and preside over its deliberations, but it also laid down that the opinion of that judge should prevail on any point which, in the opinion of the commissioners, is a question of law. Furthermore, there is an appeal on any question of law to the Court of Appeal. The sanctions which the Commission may apply are essentially those of a court of law: they may award damages, they may issue injunctions and writs of attachment, and inflict heavy penalties for disobedience. And, as though to remove all possible misconceptions, the Statute of 1888 deliberately enacted that the Commission should be a Court of Record.[1]

During the war of 1914–18 the British Government commandeered the railways of the country for national purposes. On handing them back to the companies after the conclusion of hostilities the Coalition Government, as one of its first

[1] Cf. Halsbury: *loc cit.* And see the following statutes: 36 and 37 Vic. c. 48; 51 and 52 Vic. c. 25, 58; 52 and 53 Vic. c. 57; 54 and 55 Vic. c. 12; 55 and 56 Vic. c. 44; 56 and 57 Vic. c. 29.

"reconstruction" measures, insisted on a compulsory amalgamation of the two or three hundred separate railway undertakings into four large groups. The Railways Act of 1921, which effected this reorganisation, contained important provisions relating to the Railway and Canal Commission and other adjudicating bodies.

Part I. of the Act provides for an "amalgamation tribunal" consisting of three commissioners, to which the minister was to refer any amalgamation scheme submitted to him by a railway company under the Act; or which was alternatively itself to prepare and settle schemes. This tribunal was to consider all objections to an amalgamation or absorption scheme.

The amalgamation tribunal was really created to meet the temporary needs of a special occasion, and it does not possess enough permanent significance to warrant our devoting much time or attention to its study.

Part II. of the Act enlarged the scope of the Railway and Canal Commissioners by giving them power, with a view to securing the public safety or to promoting the interests of the public or of a particular trade or locality, to require a railway company "to afford such reasonable railway services, facilities and conveniences" on their line as the Commission might order—including the provision of extensions and improvements not exceeding a cost of £100,000 in any one case. All that is required as a condition precedent for the exercise of this enormous new power is an application from a representative of the interests affected.

This was something in the nature of an attempt

to " de-judicialise " the Railway Commissioners by emphasising the executive element in their work ; for under the new statute the formulation and enforcement of policy is clearly a more dominant feature than the settlement of disputes. The settlement of a controversy between an aggrieved person and a railway company appears more as a nominal excuse on which to hang the regulation of railway administration than as the true object of the coercive powers of the Commission.

While, however, the regulatory powers of the Railway Commission were largely increased in regard to questions of service and running facilities, it was relieved of its functions in regard to rate fixing and other economic matters by the creation of an important new body known as the Railway Rates Tribunal, which was set up to deal with that class of question.[1]

The Railway Rates Tribunal consists of three permanent members, one of whom is a business man, one a railway expert, and the third a lawyer, who presides. In addition, two panels were set up, one containing representatives of trading, labour, passenger and agricultural interests, and the other of representatives of the railway companies. A member from each panel is to be added to the Rates Tribunal whenever the Tribunal or the Minister of Transport thinks it desirable.

The jurisdiction of the Tribunal is very wide ; it extends over such matters as alterations in the classification of merchandise, the variation of through rates, the fixing of group rates, tolls, terminal charges, and the reasonableness of various other

[1] Railways Act, 1921, part iii.

charges and service conditions. A question of outstanding importance was the settlement, shortly after the new grouping, of the standard charges to be made by the new amalgamations. The statute provided that each group should submit a schedule of proposed charges to the Tribunal, which was to determine the same after hearing objections. These standard charges were to be such as would, together with other sources of revenue, be likely to yield "with efficient and economical working and management" an annual net revenue—the standard revenue as it is called—equivalent to the aggregate net revenues received by all the separate companies in the year 1913, plus certain additional sums.

Here was a truly Herculean task. The mere discovery of the standard net revenue of 1913 took the Tribunal many months of hard work to ascertain: much cerebral activity on the part of the companies and their legal and financial advisers was directed towards getting the figure fixed as high as possible; and on the part of the consumers of transport services towards keeping it as low as possible.

The Railway Rates Tribunal is by statute a Court of Record and is to be judicially noticed. Its decisions are not subject to review save on questions of law, which may be taken to the Court of Appeal. The questions to be determined need not apparently even come before it in the form of a controversy. It is, in fact, far more definitely an administrative tribunal, both as regards its structure and functions, than the Railway and Canal Commission. And this despite the fact that in law it is a Court of Record and possesses many of the outward attributes of a court of law.

But although both the Railway and Canal Commission and the Railway Rates Tribunal differ widely from an ordinary court of law, and embody administrative elements to a high degree, neither of them presents a really characteristic example of an Administrative Tribunal of the English type. In contrast to the High Court of Justice they may appear to be administrative bodies, but when we compare them with more typical organs of administrative law, the resemblance which they bear to the courts of justice is more marked than the differences.

The most significant examples of Administrative Tribunals are to be found, as we suggested at the beginning of this chapter, in the judicial functions exercised by the great departments of State, or by tribunals closely connected therewith; and we shall now proceed to describe the leading instances of these.

THE JUDICIAL FUNCTIONS OF THE MINISTER OF HEALTH

"The Local Government Board", said Madden, J., in 1911, "is one of several great administrative boards who find themselves, in the course of administration, performing duties which this court regards as judicial. . . ."[1] As the Ministry of Health (now the successor of the Local Government Board in England) plays a prominent part in the subject we are discussing, and is a department which came early into the judicial arena, we may conveniently make it a starting-point.

[1] R *v.* L.G.B., 2 I.R., p 331.

The great Public Health Act passed by Disraeli's government in 1875 [1] was the first really determined effort to bring into existence an elaborate system of sanitation, regardless, in many ways, of private prejudices and private rights. The urban and rural sanitary authorities which were set up thereunder were armed with considerable powers of a coercive and compulsory nature which still form the backbone of our sanitary code; and under a certain well-known section of the Act, Section 268, a right of appeal to the Ministry of Health (as we shall in future call the department formerly styled the Local Government Board) was given to persons aggrieved by the decisions of a local authority in regard to a whole series of sanitary matters dealt with in various parts of the Act. The owner or occupier of a house, for example, can be required to make a covered drain connecting his house with a sewer. If he refuses or neglects to comply, the local sanitary authority may step in and do the work, and recover the expenses from the defaulting owner, who can appeal to the Ministry of Health against the decision of the local council. A like method of procedure and a similar kind of appeal were laid down in regard to the recovery of expenditure incurred by the enforcement of provisions for securing lavatory accommodation, the examination of drains alleged to be out of order, the purification of an unwholesome house on the certificate of the medical officer, the abatement of various kinds of nuisances, the provision of a proper water supply for dwelling-houses, the closing of polluted wells,

[1] The Act of 1875 was really a consolidating measure. The principal Act was passed in 1872.

the cleansing and disinfection of premises against infectious disease, and the levelling, paving, metalling and other treatment of private streets.[1]

The Section 268, which enacted that an appeal in all these various matters should lie to the Ministry of Health, has turned out to be so momentous, in the light of subsequent events, that we venture to quote the more significant parts of it in full :

"Where any person deems himself aggrieved by the decision of the local authority in any case in which the local authority are empowered to recover in a summary manner any expenses incurred by them . . . he may, within twenty-one days after notice of such decision, address a memorial to the Minister of Health stating the grounds of his complaint, and shall deliver a copy thereof to the local authority ; the Minister of Health may make such Order in the matter as to the said Minister may seem equitable, and the Order so made shall be binding and conclusive on all parties." The remainder of the section enacts that if the local authority had already commenced proceedings for the recovery of the expenses they should, on receiving notice of the appeal to the Minister, be stayed ; and the Minister may thereupon, if he thinks fit, direct the local authority to pay to the appellant such sum as he may consider to be a just compensation for the loss, damage or grievance sustained by him in the matter.

In the following year the Ministry of Health was again made an appellate body under the Rivers Pollution Act, 1876. By that statute it was made

[1] Public Health Act, 1875, secs. 23, 36, 41, 46, 47, 62, 70, 98, 120 and 150.

an offence to allow noxious matters to flow into a river. But a certificate may be given [1] by a qualified inspector, appointed by the Minister of Health, to the effect that the means used to render harmless sewage or poisonous matter flowing into a stream are the best or only practicable means available in the circumstances. This certificate is conclusive evidence in a court of law, and in effect usually makes all the difference between a conviction and an acquittal. The Act lays it down that a person aggrieved by the grant or withholding of a certificate may appeal to the Minister of Health against the decision of the inspector.

In 1888, when county government was revitalised by the establishment of the county councils, those bodies were empowered by Parliament to create new urban and rural districts and to alter the boundaries of any existing district or parish within their area. The statute provided that where opposition was manifested to a proposed change by a minor local authority or by a certain proportion of the local inhabitants the Minister of Health should act as an adjudicating tribunal and settle the matter finally and conclusively after holding a local enquiry.[2]

Six years later, in 1894, when the parish and district councils were set up under the Local Government Act of that year, provision was made in the statute for the compulsory acquisition of land by a county council on behalf of a parish council.[3] An appeal by a landowner against the order of the

[1] Rivers Pollution Prevention Act, 1876, sec. 12.

[2] Local Government Act, 1888, sec. 57. See also Royal Commission on Local Government, 1923, Minutes of Evidence, part i., Gibbon, M. 138, p. 59.

[3] Local Government Act, 1894, sec. 9.

county council lies, not to the courts, but to the Minister of Health.

Under the Housing Acts the Ministry of Health is made the appellate body in regard to a whole series of important matters closely affecting the rights of owners of slum property and workmen's dwelling-houses. Thus, under the Housing Act, 1925, the landlords are required to maintain certain classes of working-class houses in a condition "reasonably fit for human habitation";[1] and if they do not do so the local authority must step in and request the landlord to execute whatever works are necessary. If the landlord defaults, the local council may themselves carry out the repairs and subsequently recover the expense from the proprietor. When the landlord is served with a notice requiring him to carry out repairs or other work, or to reimburse a local authority which has acted in default of himself, he has a right to appeal to the Minister of Health.[2] Other sections enable the local authority to close and demolish dwellings which are unfit for human habitation, and here again there is conferred on the landlord a right of appeal to the Minister at almost every turn of the proceedings.[3] It was estimated that in 1924–25 no less than 25,939 houses were affected by local authorities acting under these provisions.

[1] Housing, Town Planning, etc., Act, 1909, secs. 14 and 15; Housing, etc., Act, 1919, sec. 28, now replaced by Housing Act, 1925, sec. 3. This supersedes the very small powers given to a local authority under the Housing of the Working Classes Act, 1890; under that Act the local authority could only summon an owner or occupier before the Justices of the Peace, from whom an appeal lay to Quarter Sessions.

[2] Housing Act, 1925, sec. 3, replacing Housing Act, 1909, sec. 15 (6). The provisions of the two statutes differ considerably.

[3] Housing Act, 1925, secs. 11 and 14, replacing Housing Act, 1909, sec. 17.

The Act specially lays it down[1] that the procedure in any of these appeals to the central department shall be such as the Minister of Health may by rules determine[2] and the statute also gives him authority to settle the question of costs. The Minister, in regard to any matter brought before him on appeal "may make such order in the matter as he thinks equitable", and his decision is then binding and conclusive on all parties. Where an appeal is made by a landlord against any notice or apportionment of expenditure made by a local authority, the Minister may confirm, vary or quash the order or notice as he "thinks just". There is one saving clause which enables the Minister to state a case for the opinion of the High Court on any question of law arising in the course of the appeal, if he desires to do so, and he is compelled to do so in special circumstances if directed by the court; and another which precludes the Minister from dismissing any appeal without first having held a public local enquiry "unless the appellant fails to promote his appeal with due diligence".

Over and above all this extensive jurisdiction in appeals between a local authority and a ratepayer, the Minister has wide powers of judicial enquiry and coercion over the local authority itself in regard to its housing duties. Where complaint is made to the Minister by certain specified representatives of a locality, such as a justice of the peace, or not less than four local electors, or a municipal body of

[1] Housing Act, 1909, sec 39, as amended by the Housing Act, 1919.

[2] Housing Act, 1925, sec. 115. Appeals to the Minister under powers conferred on him by the Housing, Town Planning, etc., Act, 1909, are regulated by the Housing Acts (Appeal Procedure Rules, 1919) Statutory Rules and Orders, 1423 of 1919. Dated 10/10/1919.

inferior or superior rank, as the case may be, that a local authority has failed to exercise its powers in regard to the repair, maintenance, or sanitary conditions of the houses in its area, the Minister may cause a public enquiry to be held, and can then order the defaulting local authority to carry out its duties within a specified time. In the case of a minor local authority, such as a district council, he can alternatively authorise the county council to step in and carry out the work in place of the defaulting authority. These orders are to be laid before Parliament and may be enforced by mandamus. Even wider powers are given to the Minister in regard to the provision by local authorities of new houses for the use of the working class population, a matter which in recent years has formed the most important of all the tasks of local governing authorities.[1]

THE LONDON BUILDING TRIBUNAL

A body which decides controversies closely connected with buildings and constructional work of all kinds in the metropolis is the Tribunal of Appeal operating under the London Building Act of 1894. That statute, which contains the main code by means of which the millions of structures which adorn or disfigure the face of London are regulated, gave large powers of control to the London County Council and certain other authorities, and at the same time set up[2] a Tribunal of Appeal

[1] Housing Act, 1925, secs. 23, 73, and 75.

[2] Or, to speak more accurately, modified an existing tribunal which had been constituted originally under the London Council (General Powers) Act, 1890, and altered by the L.C.C. (General Powers) Act, 1893.

to decide various questions relating to the exercise of those powers by the local governing bodies in London.

The Tribunal consists of three members, one appointed by the Secretary of State, one by the Council of the Royal Institute of British Architects, and one by the Council of the Surveyors' Institute. The members are appointed for a term of five years, and are eligible for reappointment. They are remunerated for their services, and may be removed by the Lord Chancellor for inability or misbehaviour or other sufficient cause. No member or officer of the London County Council may sit on the Tribunal.

The Tribunal has jurisdiction over a large number of questions of both a general and a technical nature. It has power to hear appeals from decisions of the London County Council regarding, for example, the laying-out of streets, the sanctioning of open spaces for working-class dwellings, and the erection of buildings at the rear of existing edifices; it can hear appeals from the refusal of district surveyors to approve the erection of a public building, or the conversion of a private building into a public one; it can hear appeals from the superintending architect concerning that vital matter the "general building line", and that less vital but more amusing question which sometimes arises as to which side of a building is the front and which side the rear; and it can hear appeals from the chief engineer relating to houses situated on low-lying ground.[1] Over these and many other ques-

[1] Griffiths and Pember: London Building Act; Arakie Cohen on the same subject. And see secs. 19, 41, 42, 13, 78, 79, 32, 25, 122, 29, and 46 of the Act.

tions the Tribunal of Appeal exercises a complete jurisdiction; its decisions are final on all questions of fact; and its determination is also binding on questions of law unless the High Court orders a case to be stated for the opinion of the court, or the Tribunal itself desires to state a case.

THE JUDICIAL POWERS OF THE DISTRICT AUDITOR

In connection with local government affairs we may notice the powers of the district auditor, who occupies a most peculiar and anomalous position in the structure of the British Constitution. He is appointed and removable by the Minister of Health, who has also statutory authority to assign and regulate the method of work. The auditors are entrusted with the task of examining the accounts of nearly all the local authorities in the county except municipal boroughs.[1] The auditor is to "disallow any item contrary to law, and surcharge the same on the person making or authorising the making of the illegal payment and shall charge against any person accounting the amount of any deficiency or loss incurred by the negligence or misconduct of that person".[2] The district auditor is to state on demand the reasons for his decisions, and a person aggrieved may then appeal to the High Court or to the Minister of Health to quash the surcharge. The mission of the auditor, in the words of a law lord, is "to find out if there is any

[1] See Royal Commission on Local Government, Cmd. 2506/1925, pp. 133-139. He examines the accounts of services for which grants-in-aid are paid even in the case of municipal boroughs; and some boroughs have chosen to have all their accounts so audited.

[2] Public Health Act, 1875, sec. 247.

excess in expenditure out of the local rates over what is reasonable ". He must hear complaints by ratepayers against expenditure which is alleged to be unlawful, and listen to what can be said in justification by the responsible members of the elected council. His power has been enormously increased by recent judgments of the House of Lords, and in practice the auditor now exerts a strong control over the whole mass of public expenditure by the local authorities of the country. He is in some respects clearly exercising judicial functions,[1] in others he is performing only administrative duties of a supervisory nature. Sometimes he appears to be the mere servant of the Minister in power; at others he figures as an independent officer wielding an irresponsible power subject to little or no control either by the administration or the judicature or even by Parliament.[2]

There are really two administrative tribunals to be observed in connection with the central control of municipal expenditure by this system of audit. In the first place there is the district auditor himself, who may be regarded as constituting a sort of tribunal of first instance; and in the second place there is the Minister of Health, who forms an administrative appeal tribunal. If the auditor surcharges a councillor for unlawful expenditure, the councillor can appeal on a point of law to the High Court; or alternatively he can appeal on social grounds or for reasons of equity to the Minister of Health, who may either quash the

[1] Rex *v.* Lisnaskea Guardians (1918), 2 I R., p. 258.

[2] For a full discussion of the whole position see my tract *The District Auditor: an Old Menace in a New Guise* (Fabian Society), 1925.

surcharge, or ratify it but remit the payment. From the Minister's decision there is no appeal.[1]

NATIONAL HEALTH INSURANCE TRIBUNALS

Of a very different nature, and far wider in scope, are the judicial powers which the Minister of Health has inherited from the Commissioners who were appointed in 1911 to take charge of the National Health Insurance scheme set up in that year. The judicial functions of the Minister in this connection may be divided into three classes.

The first type of case consists of a number of questions which arise in regard to liability to come within the scheme.[2] Thus the Minister is empowered to determine all questions whether a particular kind of employment is "employment" within the meaning of the Act; whether a person is or was "employed" within the meaning of the Act; whether a man is entitled to become a voluntary contributor. Then, again, he has to decide what rate of contribution is payable in respect of an

[1] A Government measure is now before Parliament entitled the Audit (Local Authorities) Bill containing provisions designed to alter the existing system of alternative appeals.

[2] National Health Insurance Act, 1924, sec. 89 (1), replacing sec. 66 of the original Act of 1911 and sec. 27 (2) of the Act of 1913. The wording of the section is as follows:

"If any question arises:

"(*a*) whether any employment or any class of employment is or will be employment within the meaning of this Act, or whether a person is or was a person employed within the meaning of this Act, or whether a person is entitled to become a voluntary contributor; or

"(*b*) as to the rate of contribution payable by or in respect of an insured person; or

"(*c*) as to the rates of contribution payable in respect of an employed contributor by the employer and the contributor respectively; or

"(*d*) as to the person who is or was the employer of an employed contributor; the question shall be determined by the Minister in accordance with regulations made for the purpose.

insured person, and who, in cases of doubt, is the employer of a contributor in an insurable employment. In regard to one or two of these questions anyone who is dissatisfied with the decision of the Minister may appeal on a *question of law*[1] to a judge of the High Court, whose decision is final; and the Minister has himself a similar right to submit questions to the Court. But this strictly limited right of appeal on specified matters to the High Court is not in practice utilised to any appreciable extent, and the records published by the Minister of "decisions as to liability to Insurance"[2] have a confident air of being an authoritative statement of the law, for all the world like a series of volumes containing cases decided in the courts of law—save that the Minister merely announces his decision without giving reasons for it. Thus, he decides that a *chef de partie* engaged by a hotel to concoct sauces is employed "by way of manual labour" within the Act and comes under the insurance scheme regardless of his remuneration;[3] that Salvation Army officers are not employed under contracts of service so as to make them insurable;[4] that neither the captains nor the mates of river barges remunerated by shares of the freight earnings are employed within the meaning of the

[1] National Health Insurance Act, 1924, sec. 89. "Provided that:

"(1) If any person is aggrieved by the decision of the Minister on any question arising under paragraph (*a*) or paragraph (*d*) he may appeal therefrom on any question of law to a judge of the High Court selected for the purpose by the Lord Chancellor, and the decision of that judge shall be final."

[2] See Memo 151 C, April 1925, issued by the Ministry of Health, 6d., H.M. Stationery Office; also Memo. 151 of February 1914, and Memo 151 B of April 1916.

[3] Memo. 151 C, Case 427, p. 4.

[4] *Ibid.* case 443, p. 11.

Acts.[1] These, and a score of other cases, closely resembling those constantly before the courts, in which complex facts have to be classified and thrown into legal categories, come before the Minister for decision. Between the years 1912 and 1923 over four hundred and fifty formal decisions were given by the Minister in this class of case; and though the annual number coming before his department has decreased, the very reason for this is the authoritative nature of his determinations, for, as an official witness stated recently before the Royal Commission on Health Insurance, "the decisions given have constituted, as it were, a body of case law by reference to which other cases may be settled".[2]

The formal decisions of the Minister are arrived at after proceedings which, where a hearing is given, are not unlike those of an inferior court of law, save that the official who presides over the hearing reports but does not decide. In the great majority of cases, however—the exact figure is 390 out of 457—there is no oral hearing, and the matter is decided after consideration of the information contained in prescribed forms filled in by the parties interested.[3]

The number of cases of this class formally decided each year has fallen from 195 in 1912 to less than a dozen in 1923, but these figures must not be taken as an indication that the Minister's judicial power has fallen into desuetude. For, said the official witness of the department to the Royal Commission, "apart from the formal determination

[1] *Ibid.* case 463, p. 20.

[2] Royal Commission on National Health Insurance, Appendix to Minutes of Evidence, part i. p. 8.

[3] *Ibid.*

of questions, the Ministry's function of deciding what persons are insurable, is exercised in practice by means of informal rulings". It is the policy of the Ministry to avoid as far as possible the giving of formal decisions, and " by far the greater number of questions, amounting to several thousands annually, are disposed of after any necessary local investigation, by an administrative ruling conveyed in the form of a letter or even of a verbal intimation by an inspector." [1]

There is, as we have already observed, a right of appeal in some cases to a High Court judge,[2] but as the opportunity to appeal to the courts is confined to questions of law, this reservation does not curtail the Minister's power to any considerable extent in the majority of cases, since it leaves his jurisdiction to determine questions of fact untouched and absolute. " As to the facts ", said Mr. Justice Roche, in one of these appeals to the High Court, " assuming that the Minister has directed himself rightly on the law, I cannot come to the conclusion that his decision is wrong in law unless the facts are such that the Minister could not reasonably or properly come to the conclusion to which he has come. . . . It has been put as high by counsel as to say I ought not to hold the Minister wrong in law unless there is no evidence on which the Minister could rightly come to that conclusion. Probably that test is not too high, but even making the test less exact, I am of opinion that upon the

[1] Royal Commission on National Health Insurance, Appendix to Minutes, part 1., p 8, para. 20.

[2] There was originally a right of appeal to the County Court on fact as well as law, but this was exercised in only nine cases and was abolished by the Act of 1920.

facts stated and found by the Minister there is such a balance of evidence as that the Minister could really come to either one conclusion or the other, and having come to the conclusion that he has come to, there is no reason, no power in myself, to disturb this finding."[1] In another case the same judge observed that there was " an immense amount to be said for a conclusion opposite to that at which the Minister has arrived as a matter of fact "; [2] but added that he was unable to reverse his decision in view of the absolute power of the Minister to determine questions of fact. In several cases, it may be noted, there is no right of appeal from the Minister's decision, even on a question of law.

Another class of judicial act which it falls to the lot of the Minister of Health to perform under the Health Insurance scheme is the determination of almost every conceivable type of dispute arising between an approved society and one of its insured members, or between a society and one of its branches, or between two branches of an approved society. Every society, before it could secure approval, had to make provision in its rules for the settlement of disputes between itself and its members regarding such matters as status in insurance, termination of membership, right to benefit, disciplinary action taken under the rules, and so forth. All disputes are settled in the first instance according to the rules, and there is then an appeal from the domestic tribunal to the Minister of Health. Leave to appeal must first be obtained from the Minister ; and the matter is then referred to a referee selected from a panel of lawyers, assisted

[1] Memo. 151 C, X. decision 447, p. 23. [2] *Ibid.* X. decision 448, p. 25.

by a medical assessor in medical cases, or by a woman with experience of social work where the complainant is a woman.[1] The hearing takes place locally, and the appellant is not put to any expense whatsoever.[2] The Minister can in all cases regulate the procedure.[3]

[1] National Health Insurance Act, 1924, sec 90: "(1). Subject to the provisions of the last preceding section of this Act:

"(*a*) Every dispute, relating to anything done or omitted by that person, society or branch (as the case may be) under this Act or any regulations made thereunder, between—

"(i.) an approved society, or a branch thereof, and an insured person who is a member of the society or branch or any person claiming through such a person;

"(ii) an approved society or branch thereof, and any person who has ceased to be a member for the purpose of this Act of the society or branch or any person claiming through such a person;

"(iii) an approved society and any branch thereof;

"(iv) any two or more branches of an approved society; and

"(*b*) Every dispute between an approved society and any person as to whether that person is or was at any date a member of that society for the purposes of this Act,

shall be decided in accordance with the rules of the society, but any party to such dispute may, in such cases and in such manner as may be prescribed, appeal from the decision to the Minister.

"(2) Every dispute between—

"(*a*) an insured person and an insurance committee;

"(*b*) two or more approved societies;

"(*c*) an approved society and an insurance committee,

"(*d*) two or more insurance committees;

relating to anything done or omitted by such person, society or insurance committee under this Act or any regulations made thereunder, shall be decided in the prescribed manner by the Minister.

"(3) The Minister may, subject to the provisions of this Act, authorise referees appointed by him to decide any appeal or dispute submitted to him under this section

"(4) Regulations may be made providing for the procedure on any such appeal or dispute, and any such regulations may apply any of the provisions of the Arbitration Act, 1889, but except so far as it may be so applied that Act shall not apply to proceedings under this section, and any decision given by the Minister or a referee under this section shall be final and conclusive."

[2] Royal Commission on National Health Insurance, Appendix, part 1. p. 28. Minutes, Kinnear, Q. 455-501.

[3] Ministry of Health Act, 1919, sec. 3 (1), ii; Statutory Rules and Orders, 1920/705.

An even wider jurisdiction is given to the Minister to settle disputes in which a local insurance committee, or two approved societies, are involved, since in those cases he has power to decide the question in the first instance. But in any event the determination of the Minister is final and conclusive, whether he decides in the first instance or on appeal.[1]

The third class of case in which judicial power is given to the Minister is in regard to the medical treatment of insured persons or the supply of drugs and appliances by chemists in connection with that treatment. The Minister wields very large powers indeed in this field.

The system provides that every qualified doctor who so desires is entitled to have his name included in the medical list, or panel, of the local insurance committee. In this way he becomes eligible for selection by an insured person as his doctor for medical treatment provided under the scheme. Where complaint is made concerning the service rendered by the doctor to a contributor, if the Minister, after enquiry, "is satisfied that the continued inclusion in the list of any medical practitioner would be prejudicial to the efficiency of the medical service of insured persons",[2] he may remove the practitioner's name from the list and disqualify him from inclusion therein for as long as he may think fit—a penal act which would have the result, in the case of thousands of doctors, of depriving them of the greater part of their income.

Regulations made under the Act provide that if

[1] Ministry of Health Act, 1919, sec. 90 (3).
[2] Sec. 24 of the National Health Insurance Act, 1924.

representations are made concerning the efficiency of a medical practitioner by an insurance committee, local medical committee or panel committee, the Minister is bound to institute an enquiry, and in other cases he may do so if he pleases.[1] Each enquiry is carried out by a body specially constituted for the purpose, consisting of three persons, one of whom is a practising lawyer, and the two others medical practitioners. The parties to an enquiry have power under the regulations to compel by subpœna the attendance of witnesses and the production of documents.[2]

Under these regulations enquiries are made into a large number of complaints relating to the skill and professional conduct of medical practitioners on the panel. In a single volume we find investigations as to charges brought against panel doctors in regard to failure to give proper attendance to an old man suffering from a paralytic stroke,[3] the charging of fees to insured persons,[4] the drunkenness of a panel doctor while driving a motor-car,[5] the canvassing of patients for transfer from another practitioner's list,[6] the use of objectionable language to insured persons,[7] and the negligent diagnosis of diphtheria as influenza.[8]

In these and other " matters of a judicial nature "

[1] For a full description of the elaborate system of committees which administer the system of National Health Insurance, see Royal Commission on National Health Insurance, 1925, Appendix to Minutes of Evidence, part 1. p. 81 *et seq.* See also National Health Insurance (Medical Benefit) Regulations, 1920, S.R. and O. 1920/301.

[2] *Ibid.* sec. 91, Reports of Inquiries and Appeals under the National Health Insurance (Medical Benefit) Regulations, vol. iii. 924, Ministry of Health, p. 7. See also National Health Insurance (Medical Benefit) Regulations, S.R. and O. 1920/301.

[3] *Ibid.* p. 19. [4] *Ibid.* p. 33 [5] *Ibid.* p. 36.
[6] *Ibid.* p. 43. [7] *Ibid.* p. 48. [8] *Ibid.* p. 53.

arising under the Act, the Minister is required by the statute [1] to exercise his powers and duties through a special body such as we have described. But this only means that the preliminary work of investigation and report is carried out by the committee of three appointed by the Minister. The business of deciding remains vested in the Minister and his department, and it is for him and his advisers to determine what sentence, if any, shall follow on the recommendations and findings of the committee of enquiry. It not infrequently happens that the Minister overrides the recommendation of the committee.[2]

The punitive powers of the Minister are very large. Not only can he remove a medical practitioner from the panel, but he can also impose heavy fines and the payment of costs.[3] Thus, where two doctors in partnership were found to have persistently charged fees for supplying medicine to insured patients, the Minister "decided that the doctors should not be removed from the Medical List, but that £1000 should be withheld from the Supplementary Grant . . . and this sum, together with the costs incurred by the Committee in connection with the inquiry, should be recovered from the practitioners by deduction from their remuneration or otherwise".[4] Various other fines of substantial amounts are imposed in the ordinary course of business.

[1] National Health Insurance Act, 1924, sec. 91.

[2] Royal Commission, Appendix to Minutes of Evidence, part iii. p. 471.

[3] Reports of Inquiries and Appeals, etc, p 7. See also Article 36 of the Medical Benefit Regulations.

[4] Reports of Inquiries and Appeals, etc., p. 62.

A similar jurisdiction is exercised by the Minister over persons, firms, and bodies corporate supplying drugs, medicines, and appliances for the use of insured patients. Every supplier of these articles throughout the country has a right to have his name placed on the lists prepared by the local insurance committees, "except in cases where the Minister after enquiry is satisfied that the inclusion or continuance of that person in the list would be prejudicial to the service".[1] This enables the Minister to investigate and penalise a large number of offences, such as the supplying of short measure of medicine[2]; inaccurate dispensing[3]; or the making up of prescriptions by unqualified persons.[4]

The exercise by the Minister of Health of jurisdiction over doctors engaged in National Health Insurance work has aroused the most intense opposition on the part of the organised bodies representing the profession. The British Medical Association, comprising some 28,000 practitioners, protested before the Royal Commission on National Health Insurance that the decisions of the Minister are of "an inexplicable character, and have given rise in the minds of many practitioners to a feeling of injustice or even a suspicion of vindictiveness".[5] The Medical Practitioners' Union, with a membership of less than four thousand, made up for the comparative insignificance of its size by the furious language with which it condemned the whole

[1] Sec. 24 (5) (*b*) of the Act.

[2] Reports of Inquiries and Appeals, etc., p. 77.

[3] *Ibid.* p. 80.

[4] *Ibid.* p. 84.

[5] Royal Commission on National Health Insurance, Appendix to Minutes of Evidence, part iii. p. 450.

system. The entire machinery for dealing with complaints, said the Medical Union, involved "such manifest and gross injustices" that they found it difficult in giving evidence, "to deal with the matter in a temperate spirit".[1]

Even more striking as an example of the power given to a department of State to adjudicate on matters of technical detail concerning the conduct of professional work are the appeals heard by the Minister of Health from the decisions of insurance committees to deduct sums from the remuneration of medical practitioners on account of excessive prescribing. Here the Minister has had to decide such nice questions as the appropriate penalty to be imposed on a doctor whose persistence in prescribing antifebrin and phenacetin powders instead of tablets resulted in the average cost of his prescriptions coming to 37·72 pence per insured person as compared with the average cost for the area of 28·18 pence![2] Or, again, what was to be the punishment which justice required should be meted out to medical practitioners who were guilty of such grave offences as the repeated ordering of 6-oz. instead of 8-oz. mixtures, the employment of tinctures of gentian and calumba when infusions would have done equally well, and "the unnecessarily frequent ordering of tincture of orange as a flavouring".[3]

It is the exercise of these powers which *The Times*[4] described in a leading article as "Trial by Whitehall". The offence is detected in the first

[1] *Ibid.* p. 468.
[2] Reports of Inquiries and Appeals, etc, p. 92.
[3] *Ibid.* p. 98.
[4] October 21, 1924.

instance by the fellow-practitioners of the accused, who set on foot a complaint " if it appears to them in the case of any practitioner that by reason of the character or quantity of the drugs or appliances so ordered or supplied, the cost is in excess of what may reasonably be necessary for the adequate treatment of those persons "—reasonable necessity meaning the average amounts given in similar cases by other doctors in the neighbourhood. But it is the Minister of Health who is responsible for the trial, or, at any rate, for the supreme function of imposing the sentence ; and from his decision there is no appeal. " The Minister of Health ", said *The Times* in protest, " acts apparently as prosecuting counsel, judge and jury ".

But most remarkable of all are the sweeping powers of a judicial character which are given to the Minister under Section 107 of the National Health Insurance Act. Here it is provided that where an approved society or an insurance committee allege that excessive sickness has taken place among insured persons in their district owing to the conditions of employment prevailing in the locality, bad housing, or lack of sanitation, an insufficient or impure supply of water, or a neglect to enforce the health provisions of the factory, mines, public health, housing, and similar Acts, the approved society or insurance committee making the complaint may claim from the person or authority alleged to be in default the extra expenditure incurred by the excessive sickness. If the claim is opposed, the matter is to be laid before the Minister of Health, who is then to appoint a " competent person " to hold an enquiry, if he is satisfied there

is substance in the complaint.[1] The "competent person"—who might be an official on the Minister's staff—may order the extra expenditure to be made good by any party he finds to have been in default.

Truly enormous are these last-named powers of the Ministry; but so far they have never been put into operation, for the good and sufficient reason that the whole administrative system of the National Health Insurance scheme makes it impossible to prove a successful allegation of the type contemplated by the section.[2] The great majority of insured persons are members of approved societies; and these societies are not based on geographical areas but have their members scattered throughout the country. There is no co-ordination between the various approved societies of such a kind that an analysis could be made by each society of the sickness in particular areas, and then a correlation between territorial districts and the rate of sickness obtained from all the results. In the second place, it is the opinion of the chief officials who have so far been in charge of the Insurance Department of the Ministry of Health that it is impossible to isolate the causes of sickness to an extent sufficient to enable the Ministry to make use of its wide powers of punishment under this provision.[3] Slum dwellers, for example, often suffer from irregular and badly paid employment. They also suffer from

[1] Where the excess expenditure is alleged to arise from neglect to enforce statutes administered by the Home Secretary or the Board of Trade, the "competent person" is to be appointed by one of these departments instead of by the Minister of Health.

[2] Royal Commission on National Health Insurance, Minutes of Evidence, vol. i., Kinnear, Q. 143-144; vol iv., Q. 23,792-23,794; Brock, vol. i., Q. 1470, 1491-1498. As to Scotland, see Leishman, vol. i., Q. 2120.

[3] *Ibid.*

excessive sickness. It is difficult to assign the excessive sickness to bad housing conditions and to disregard the other causes of bad health which flow from low industrial conditions.

The sweeping extent of the powers of the Minister in this connection appear, indeed, in the eyes of his principal advisers, to be equalled only by the impracticability of their character; and there is little likelihood of their being made use of in the near future—at any rate until the feeble statistical work done by the Ministry in connection with Health Insurance is greatly improved.[1]

But whether they are used or not, it is extremely significant that Parliament should have deliberately given, first to the Insurance Commissioners and later to a Minister of the Crown, gigantic powers of the kind we have described: that a department of the Government should be legally empowered to order damages to be paid by an employer who has neglected to carry out the Factory Acts, to the detriment of his workers' health; by a local authority which has failed to remedy imperfect sanitation or bad housing conditions; by a water company which has provided an insufficient or contaminated supply of water; by a landlord who has refused to make his houses sanitary and habitable. The Minister's functions are far more extensive than those wielded by many a judge, and from his decision, or that of his nominee, there is no appeal. The doom which he pronounces is enforced in the

[1] The Royal Commission on National Health Insurance observed that the section as it stands is "incapable of effective application" and recommended that the penal provisions should be eliminated and the powers of investigating excessive sickness extended (Report, pp. 259-260, Cmd. 2596/1926).

High Court like a judgment. Furthermore, the Minister of Health may himself take action in the first instance and lodge the complaint if he believes that local conditions are throwing an unnecessary burden on the Health Insurance scheme. Here he would be acting not merely as judge but also as accuser or party to the complaint.

There are a large number of other matters of a judicial nature which it falls to the lot of the Minister of Health to decide under the National Health Insurance scheme, but it is not necessary to enumerate them here. Those which have been described are sufficient to give an adequate picture of the vast number of judicial functions which come under the jurisdiction of the Ministry of Health in regard to this one subject of health insurance alone.[1]

TRIBUNALS FOR UNEMPLOYMENT INSURANCE

The Unemployment Insurance scheme is similar in structure to the system of Health Insurance in some respects and differs from it in others. Like the latter it is based on occupation; that is to say, a person comes within the operation of the scheme by reason of the fact that he or she is employed under certain specified conditions. The system is administered by the Minister of Labour, and he is given power (in terms closely resembling those conferring similar powers on the Minister of Health in connection with Health Insurance) to decide any question which arises whether a particular employment is such as to make a person engaged therein liable to become insured under the Act;

[1] As to the judicial functions of the Minister of Health regarding claims for pensions, see *post*, pp. 137-139.

who is the employer of an employed person (often a difficult matter to determine); the rates of contribution payable by or in respect of employed persons, and other cognate matters.[1] An appeal from the Minister lies to a single judge of the High Court nominated by the Lord Chancellor for the purpose, and his decision is final. The right of appeal here, it is to be noted, differs from that conferred in the case of similar matters connected with Health Insurance in that it is not limited to questions of law alone, but lies also apparently on questions of fact. The Minister may, if he thinks fit, himself refer the question for decision to the High Court; and he is in all cases entitled to appear and be heard. Government departments are no longer in the habit of following the rule laid down by the Victorian age for good children, whose duty it was to be seen and not heard.

The questions arising in connection with unemployment insurance which are most important in the aggregate, though often trifling in the individual instance, are those relating to claims for unemployment benefit; and it is interesting to observe the machinery which has been set up for determining these claims without recourse being made to the ordinary courts of law.

There are three authorities concerned in the matter: first, the insurance officer, an official appointed by the Minister of Labour[2] (in practice usually the manager of the local Employment Exchange); second, the Court of Referees, consisting of one or more members chosen to represent

[1] Unemployment Insurance Act, 1920, sec. 10. See also S.R. and O. 1920/1814, as to procedure.

[2] *Ibid.* sec. 12 (1).

employers, an equal number chosen to represent the workers,[1] and a chairman (usually a lawyer) appointed by the Minister; and third, an umpire and deputy umpires appointed by the Crown (presumably on the recommendation of the Minister of Labour with the concurrence of the Lord Chancellor).

All claims for unemployment benefit, and "all questions whether the statutory conditions are fulfilled in the case of any person claiming benefit, or whether those conditions continue to be fulfilled in the case of a person in receipt of such benefit, or whether a person is disqualified for receiving or continuing to receive such benefit, or whether the period for which an insured contributor who has lost his employment through his misconduct or who has voluntarily left his employment without just cause is to be disqualified should be some period less than six weeks, or otherwise arising in connection with such claims"[2]—all these questions are to be determined in the first instance by one of the insurance officers mentioned above.

In any case where benefit is refused or stopped, or reduced below the amount claimed, the worker may (within a specified period) require the insurance officer to report the matter to the Court of Referees. The court, after considering the circumstances, then make whatever recommendations they think fit to the insurance officer, who, unless he disagrees, carries it into effect. If the officer does disagree with the decision he must, if requested by the Court

[1] The representatives of employers and workers are selected usually from persons recommended by local Advisory Committees. See S.R. and O. 1920/2116.

[2] *Ibid.* sec. 11 (1).

of Referees (or by a trade union of which the worker is a member, or by the claimant himself if the referees consent) refer the recommendations to the umpire, whose decision is final and conclusive. The insurance officer may, if he desires, short-circuit the matter by referring the claim in the first instance to the Court of Referees instead of himself deciding it.[1]

Here, it is to be observed, is an elaborate system of co-ordinated tribunals charged with the statutory task of determining intricate questions of fact and difficult points of law in connection with questions which may effect the lives of millions of workers and their families. The whole of this adjudicating machinery is placed outside the ordinary judicial system of the country; its conclusions are final; and neither party can appeal to the courts of law. An idea of the amount of work performed by this hierarchy of Administrative Tribunals may be obtained when it is observed that the Courts of Referees alone decide, on an average, about 15,000 cases every month[2] of which about 200 to 300 are appealed to the umpire.

The tribunals vary greatly as to their constitution. The insurance officer is an ordinary civil servant subject to the normal conditions of service and discipline prevailing in the higher ranks of the Civil Service. In practice he is usually the manager of the local employment exchange acting, as it were,

[1] In addition to the questions mentioned above, certain other matters have to be determined by the Minister himself. See, for example, Unemployment Insurance Act (No. 2), 1924, sec. 1 (6); and sec. 1 (2) of the Act of 1922. In practice the insurance officer decides these, acting for the Minister in a direct capacity.

[2] This figure is for 1925, and is taken from statistics kindly furnished to me from an official source.

in a special capacity. Then there is the Court of Referees, with its frank avowal of representative bias counteracted theoretically by an independent chairman holding the balance impartially between conflicting sympathies and guiding the proceedings with a trained legal mind. Finally, there is the umpire, who by custom is impartial, by training a lawyer, by tenure of office and method of appointment an independent public officer, by tradition a person endowed with the judicial mind. The machinery of adjudication thus attempts to combine all the interests nearly concerned in the proper administration of unemployment insurance: the central government department, the employer, the worker, and the general public at large. The umpire, who is a trained lawyer representing nobody in particular, and whose position has been denoted by a title used nowadays almost exclusively to signify the man whose job it is to see that cricket is played fairly according to the rules of the game, is the final authority in matters under dispute. It is assumed that he will embody the impartial attitude manifested by official judges in the courts; but the other two tribunals are frankly not independent; and in particular they are subject, potentially at any rate, to a very considerable control by the Minister of Labour, who exercises the power of appointing the insurance officer in the one case and the chairman of the Court of Referees in the other.

One of the statutory conditions that an insured contributor must fulfil before he is entitled to unemployment benefit is to show that he is "capable of and available for work", and "genuinely seeking

work but unable to obtain suitable employment " ; [1] and the Act then goes on to say that an insured contributor shall not be disqualified by reason only that he refuses to accept work arising out of a stoppage due to a trade dispute, or because he declines work in his own district at lower wages or on less favourable conditions than those which he habitually obtained there, or work offered elsewhere on worse terms than the local trade union rate or those recognised by good employers.[2] A whole series of social questions of far-reaching significance relating not merely to wages and hours, but also to housing and transport conditions, and even to such matters as the share of control enjoyed by the workers, may thus arise at any moment on the question of what constitutes " conditions less favourable ", to be decided by the tribunals which have been described above.

THE JUDICIAL FUNCTIONS OF THE BOARD OF EDUCATION

The Board of Education is a department which has to decide a wide variety of matters relating to the system of public instruction. One of the most important of these is the determination whether a school is necessary or not.[3] This applies not only to existing schools, but also to new schools which local Education Authorities and other bodies propose to build. Thus, when notice has been given of an intention to provide a new public elementary

[1] Unemployment Insurance (No. 2) Act, 1924, sec. 3.
[2] Unemployment Insurance Act, 1920, sec. 7.
[3] Education Act, 1921, sec. 19 (1).

school, an appeal may be made to the Board by the managers of an existing elementary school or by the local Education Authority, or by ten ratepayers, and the Board then decides whether the new school shall or shall not be erected. In deciding an appeal of this kind, or in determining whether an existing school is necessary, the Board must "have regard to the interest of secular instruction, to the wishes of parents . . . and to the economy of the rates", but no other directions are enjoined.

When the conflict between the educational needs of the nation and the financial claims of the schools provided by religious denominations came to a head at the beginning of the present century, the compromise arrived at provided that the local Education Authority should be responsible for all secular instruction in the non-provided schools, which were henceforth to be maintained largely out of the money paid by the general body of ratepayers. Religious instruction of a denominational character might continue to be given in the schools under certain conditions.[1] As part of the settlement, the Board of Education was made, and still remains, the final authority for deciding almost any "question" which arises between the local Education Authority on the one hand and the managers of the non-provided schools on the other. This jurisdiction has been exercised over a great diversity of topics, including controversies over the appointment and dismissal, remuneration and educational qualifications[2] of teachers; the use of accommoda-

[1] Education Act, 1921, sec. 29.

[2] Crocker *v.* Plymouth Corporation (1906), 1 K.B., p. 494.

tion by the local Education Authority in the denominational schools; the expense involved in administering a non-provided school, and even such details as the wages which should be paid to a cleaner.[1]

But the jurisdiction of the Board of Education is not limited merely to the determination of disputes arising between the managers of non-provided schools and a local Education Authority. It extends also over disputes between the local Authority and teachers, in regard to the assessment of teaching service for the purpose of computing superannuation allowance;[2] over disputes between one local Education Authority and another in regard to the amount of contribution payable between them in respect of "border" children;[3] over disputes between local Education Authorities and employers, in regard to the reasonableness of requirements made by the former respecting the attendance of young persons at continuation schools;[4] over granting of licences to permit children to take part in public performances;[5] and over disputes between a local Education Authority and parents concerning the question, among others, whether a child is or is not mentally defective. There are also a number of other matters in which only the local Education Authority and the Board of Education are concerned, which have to be determined by the latter: for instance, whether the purposes which

[1] See Owen's *Education Acts* (21st ed.), under sec. 29 (9) of the Education Act, 1921, for the cases.

[2] See School Teachers (Superanuation) Act, 1922, and Board of Education (Contribution) Rules, 1922, made thereunder; Statutory Rules and Orders, 1922/852.

[3] Education Act, 1921, sec. 129. [4] *Ibid.* sec. 93. [5] *Ibid.* sec. 101.

a local Authority wishes to carry out are purposes relating to elementary education or higher education —a matter of interpretation which often determines whether or not a local council has or has not the necessary power[1] to carry out some educational project it has in mind; what amount is payable in respect of a child living in a charitable institution, and whether the child is or is not resident therein for certain purposes.[2]

All these multitudinous questions, often involving intricate sets of facts and complicated points of law, fall to be determined by the Board of Education. Of its wide jurisdiction and extensive powers in these matters the public hears nothing and knows less; but within the province which has here been outlined its rule holds absolute sway, its power is unbounded, its first word the final utterance on the subject, binding and conclusive in law on all concerned.

THE JUDICIAL FUNCTIONS OF THE BOARD OF TRADE

Another department which discharges a considerable number of judicial functions through its officials, is the Board of Trade. Under the Merchant Shipping Acts the Board of Trade is entrusted with the determination of a large number of questions in dispute between those who earn their living by the sea. For example, a marine superintendent employed by the Board is empowered by statute to determine disputes between the owner

[1] Crocker *v.* Plymouth Corporation (1906), 1 K.B., p. 494

[2] Education Act, 1921, sec. 3; Education (Institution Children) Act, 1923.

of a fishing-boat and the skipper or seaman of the boat concerning the latter's share in the profits of a voyage or a fishing catch.[1]

The Board of Trade, again, is charged with the administration of the Gas Regulation Act, 1920, which involves the exercise of definite judicial functions. This Act of 1920 provides for the regulation of the price of gas in accordance with its calorific value. The gas producers are permitted to determine the calorific value of the gas which they supply, the consumers paying only for the heat units consumed regardless of the volume of gas in which the undertakers chose to supply those units.[2] A declaration of calorific value by the producer becomes in effect a contract to supply gas of that value, and the due fulfilment of the contract is ensured by the provisions of the Act relating to testing. For this purpose the Board of Trade is required to appoint three persons to act as gas referees to supervise the methods and manner of testing, the actual tests being carried out, in accordance with the referees' instructions, by gas examiners appointed by the local authority. The Board is furthermore required to appoint a " competent and impartial " person to be Chief Gas Examiner, to whom appeals may be brought by any producer against a prescription of the gas referees; or by a producer who feels aggrieved by an adverse report of a gas examiner. If the report of a gas examiner shows certain deficiencies in the gas compared with its declared calorific value, the producers become liable to forfeitures on summary conviction and other penalties ;

[1] Merchant Shipping Act, 1894, sec. 387.
[2] 10 and 11 Geo. V c. 28.

so it can be seen that the hearing of the appeal by the chief examiner is a matter of some importance.

THE JUDICIAL FUNCTIONS OF THE MINISTER OF TRANSPORT

The Ministry of Transport appears to be the only Central Department of State (apart from the Home Office)[1] on which is conferred the power of hearing appeals in regard to the granting of licences. This seems to be a somewhat new departure from established constitutional practice. It is to be found for almost the first time in the Roads Act, 1920,[2] which enacts that where application is made for a licence to ply for hire with an omnibus, and the local authority refuses to grant the licence, or issues it subject to conditions, the applicant may appeal to the Minister of Transport, who can make whatever order he thinks fit. The order of the Minister is final and enforceable, and is not to be brought up for review before any court.

Another very important type of appeal is conferred on the Minister of Transport by the London Traffic Act, 1924. This statute enables traffic-licensing authorities in London to attach conditions to the grant of motor-bus licences for vehicles plying for hire in the metropolitan area, and the holder must then deposit a schedule of approved routes, times, number of omnibuses and services to be maintained. Any other transport company which is running on the same route can then appeal to the Minister on the ground that an increased

[1] The Home Office hears appeals from a refusal by a local authority to grant a licence for storing petrol. See Petroleum Act, 1871, sec. 10; also Sir Edward Troup: *The Home Office*, p. 195.

[2] Sec. 14 (3).

service is required over and above that set out in the schedule, or, on the contrary, that there are too many omnibuses on the route. The Minister can then make any order that he thinks fit in the matter, and in this way very largely controls the right to run motor-bus services in the London streets.

An appeal of a somewhat different kind lies to the same Minister in respect of the action of a borough or a county council in restricting traffic passing over bridges or culverts. The Minister is empowered to make almost any decision in the matter he chooses, providing that no additional liability is imposed on a railway company as a consequence.[1]

The Minister of Transport was also made the adjudicating authority in regard to a whole series of matters connected with electrical supply under the Electricity (Supply) Act, 1926, which set up a Central Board with strong powers to deal with the provision of electrical power on a national scale. Some of the judicial functions of the Minister are of great importance : where, for example, a generating company is forced to sell its undertaking to a purchasing authority the Minister of Transport is given power to determine any questions which may arise in relation to the purchase.[2] On the other hand, the Minister has also to adjudicate on matters of detail, such as whether a landowner or occupier can be compelled to lop down a tree or hedge which obstructs an electrical transmission line[3] owned by an authorised undertaker.[4]

[1] Ministry of Transport Act, 1919, sec 11; Locomotives Act, 1897, sec. 6 ; Locomotives Act, 1862, secs 6 and 7.

[2] Electricity (Supply) Act, 1926, sec. 39 (1) (*b*).

[3] *Ibid.* sec. 34.

[4] Certain questions under the Act are to be determined by the Electricity Commissioners. See, for example, sec 40 (2).

The Chancellor of the Exchequer has recently sounded the death-knell of the Ministry of Transport on grounds of economy. This will presumably result in the Minister's functions being transferred to other departments of State. But upon exactly whom his judicial mantle will descend is, at the present time, a matter for conjecture. The question is not of great moment to our inquiry, since what is significant is the general tendency rather than the exact position at any given moment.

PENSIONS TRIBUNALS

The administration of almost any scheme of pensions necessarily involves a large number of disputed claims, and it is interesting to observe the methods which have been adopted for settling controversies of this kind in the various national Old Age, Widows', Orphans', and War Pension schemes in England. Under the original Old Age Pensions Act, 1908, all claims for pension and all questions whether a person was qualified in law to receive a pension were to stand referred to the local Pension Committees which were set up throughout the country; and the Committee were to obtain a report from the local pension officer, an official appointed by the Treasury, and then give their decision on the claim. From the decision of the local Pension Committee an appeal lies, at the instance of the pension officer or any person aggrieved, to the central pension authority, which was at first the Local Government Board, and now the Ministry of Health; and the decision of that department is final and conclusive.[1] If there is no

[1] Old Age Pensions Act, 1908, sec. 7.

appeal the decision of the local Pension Committee is binding.

When the war of 1914–18 produced a vast host of disabled soldiers, and the dependants of those soldiers who had been killed, to whom pensions had to be paid, the machinery of adjudication provided by the War Pensions Acts for the settlement of disputed claims consisted similarly of a series of administrative tribunals of one kind or another. Thus, the local War Pensions Committees (which had a large amount of purely administrative work) had also to hear complaints made by persons receiving or claiming pension, and to enquire into any matter referred to them by the Minister, and to make recommendations to the Minister.[1] There was an appeal allowed in these and many other cases, where a final award had been made[2] or a claim rejected on certain specified grounds, to a Pensions Appeal Tribunal, whose decision is final and conclusive. These Appeal Tribunals were constituted by the Lord Chancellor, and consist of three persons: a lawyer, a disabled officer or man, and a medical practitioner.[3]

More recently still it was necessary to set up machinery of adjudication in connection with the scheme of Widows' and Orphans' Pensions adumbrated by Mr. Winston Churchill in his first Budget. Here the enabling statute provides that all claims for pension must be made direct to the Minister of Health, who makes a decision. If the claimant is dissatisfied with the award of the Minister, the

[1] War Pensions Act, 1921, sec. 2. [2] *Ibid.* sec. 4 (3).

[3] War Pensions Act, 1919, sec. 8. In some cases the lawyer is replaced by a second doctor. See sec. 4 (3) *b* of the Act of 1921.

controversy is referred to referees selected from a panel of referees; and their decision is final and conclusive.[1]

A claim for pension may at first sight appear to form a special class of dispute, not comparable to a controversy of the sort which courts of law determine. But this is not really the case. A claimant for pension is endeavouring to assert certain rights with which he alleges himself to have been endowed, and it is immaterial whether those rights accrue by virtue of membership of an association, employment in a firm, contract, or social provision made by the community in respect of disability, old age and so forth, and clothed in statutory form. When the claim is opposed, the dispute crystallises into a *lis inter partes*, and there is no necessary and inherent reason why it should be disposed of by an administrative tribunal rather than by the courts, apart from questions of social expediency. We say this in order to guard against the assumption which is often made that it is somehow "natural" for the judicial functions ancillary to a State pension scheme to be undertaken by Administrative Tribunals.

THE ATTITUDE OF THE JUDICATURE

I have made in the preceding pages a somewhat detailed but by no means exhaustive survey of some of the judicial functions which comparatively recent legislation has placed in the hands of departments of the central government, or of administrative tribunals working in conjunction with, and

[1] Widows', Orphans', and Old Age Contributory Pensions Act, 1925, sec. 29.

usually controlled to a greater or less extent by, those departments. I now propose to describe the view which has been taken by the highest courts of the country of the way in which the administrative departments of State may or should carry out their judicial functions.

One of the earliest cases came before the courts four or five years after the passing of the Public Health Act in 1875. This arose out of an appeal to the Ministry of Health under Section 268 of that Act (which has been given in full on p. 103) by a landlord who had been required by a local authority to pave a street on which his premises were fronting, and who had then been charged with the expense incurred by the local authority when acting subsequently in his default. Brett, L.J., remarked that whereas the decisions of the local authority in the matter were clearly not to be considered judicial, he was strongly of the opinion that the decision of the Ministry of Health (or the Local Government Board, as it was then called), certainly was judicial; and that it was the duty of the Ministry to hear the parties presenting the memorial containing the grounds of appeal.[1] A few years later, in 1886, Mr. Justice Mathew, in language which was obviously hostile to the same department, made it clear that he refused to regard the powers of the Minister of Health as usurping or excluding the jurisdiction of the court, unless the aggrieved person himself chose to resort to Whitehall and thereby submit to the verdict of the department. "I should have thought", said the learned judge, "that there was much weight in the argument that the Local Govern-

[1] The Queen *v.* L.G.B., 10 Q.B.D., p. 309.

ment Board could not be treated (under Section 268) as a court having exclusive jurisdiction in a case of this kind. It may be that if a party chooses to resort to that tribunal, he should be bound by what it does. But that it should otherwise be conclusive, is opposed to all principle. It is not a court. No procedure is pointed out, and the idea is that the Board are to pronounce what judgment they choose, though opposed to law and principles of equity, so long as they think it equity." [1]

Although there was a vast expansion of activity in just those fields of public administration where the great departments of State were empowered to exercise judicial functions, no striking change in the attitude of the judges towards these constitutional phenomena took place for a whole quarter of a century. But in 1911 and 1915 there came before the House of Lords two cases which may be regarded as landmarks for the student of law and government in England.

In the Board of Education *v.* Rice and others [2] the matters in issue concerned the jurisdiction of the Board to determine a question regarding the discrimination by a local education authority against a non-provided school in the matter of salaries, and the enforcement by the Board of their decision. The immediate circumstances of the case are of no great importance. Lord Loreburn, the Lord Chancellor, pointed out in his speech in the House of Lords that recent statutes had imposed upon departments and officers of State the duty of deciding questions of various kinds. "In the present

[1] Eccles *v.* Wirral Rural Sanitary Authority (1886), 17 Q.B.D., p. 107.
[2] (1911), A.C., p. 179.

instance", he continued, "as in many others, what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be of an administrative kind; but sometimes it will involve matters of law as well as matters of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to two sides, for that is a duty lying upon anyone who decides anything. But I do not think they are bound to treat such a question as though it were a trial." The Board has no power to administer oaths, the Lord Chancellor added, and need not examine witnesses. They can obtain information in any way they think fit, so long as the parties are given an opportunity to correct or contradict statements likely to prejudice their case. Provided that were done, no appeal would lie to the courts. The Board had no jurisdiction to decide abstract questions of law, but only determines actual differences as they arise. "The Board", he concluded, "is in the nature of an arbitral tribunal, and a court of law has no jurisdiction to hear appeals from its determination either upon law or upon fact" unless they do not act judicially in the way mentioned.

The late Professor Dicey thought that the Board of Education *v.* Rice was important because it established the principle that power conferred by Act of Parliament upon a government department must be exercised strictly in accordance with the terms of the statute, or would otherwise be

treated by the courts as invalid;[1] but its real significance seems to me to lie in the conscious recognition given by the highest court in the land to the comprehensive and exclusive character of the judicial functions exercised by the Board of Education. For the first time it was admitted that an administrative department of the government had power to determine, finally and absolutely, not mere matters of fact, but also questions of law. If much of the law in the past had been made by judges, some of it at least would in the future be made by administrative officials.

THE ARLIDGE CASE

Of still greater importance was the case of the Local Government Board *v.* Arlidge,[2] which came before the House of Lords in 1915. In this case the Hampstead Borough Council had made a Closing Order in respect of a house in their district which appeared unfit for human habitation, and Mr. Arlidge, the owner, had appealed to the Minister of Health in accordance with the procedure described earlier in this chapter.[3] The Minister, after holding a public local enquiry, dismissed the appeal, and Mr. Arlidge then applied to the courts to declare the decision of the Minister to be invalid, mainly on the grounds that the Order in which it was embodied did not disclose which of the officials in the Ministry actually decided the appeal; that he, the plaintiff, did not have an opportunity of being heard orally by that official,

[1] A. V. Dicey: "The Development of Administrative Law in England", *Law Quarterly Review*, xxxi. p. 148.

[2] (1915), A.C., p. 120.

[3] See p. 103.

whosoever he may have been ; and that he was not permitted to see the report of the inspector who conducted the local public enquiry on behalf of the Minister. The Court of Appeal held by a majority that it was contrary to natural justice for the Minister to dismiss the appeal without disclosing to the appellant the contents of the inspector's report, and without giving him a chance of being heard ; and they therefore allowed the appeal.[1] But the House of Lords held that he had no right to object to the Minister's Order on these grounds.

Lord Haldane, then Lord Chancellor, remarked in the course of his speech that when the duty of deciding an appeal was imposed " those whose duty it is to decide must act judicially. They must deal with the question referred to them without bias, and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must be come to in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice." But, he continued, the procedure of every tribunal need not follow the same lines. It may vary according to the nature of the tribunal, although tradition has in this country prescribed certain principles for a court of law to which in the main the procedure must conform. It has become increasingly common, he pointed out, for Parliament to give an appeal " in matters which really pertain to administration, rather than to the exercise of the functions of an ordinary court, to authorities whose functions are administrative and not in the ordinary sense judicial ". When Parliament entrusts a department, such as the Ministry

[1] Rex *v.* Local Government Board (1914), 1 K.B., p. 160.

of Health, with judicial duties, Parliament must be taken, in the absence of any declaration to the contrary, to have intended it to follow its own particular methods of procedure, which is necessary if it is to do its work efficiently. In a great department like the Ministry of Health the Minister at the head is directly responsible to Parliament for everything that is done in his department. A huge volume of work is entrusted to him, most of which he cannot do himself. "He is expected to obtain his material vicariously through his officials, and he has discharged his duty if he sees that they obtain these materials for him properly. . . . Unlike a judge in a court, he is not only at liberty, but is compelled to rely on the assistance of his staff. When, therefore, the Ministry is directed to dispose of an appeal, that does not mean that any particular official of the Ministry is to dispose of it." Provided that the work is carried out fairly and judicially in the sense indicated by Lord Loreburn in the Board of Education *v.* Rice, no other body save Parliament can review what has been done by the Minister who is responsible. Finally, Lord Haldane expressed the view that the Board was not bound to hear the appellant orally, provided he had had the opportunity (which was, in fact, provided) of stating his case. There was, he added, no *lis inter partes* in matters of this kind.[1]

Lord Moulton took up in effect a similar point of view. After describing the way in which the old method of summoning a householder before the justices of the peace had been superseded by a system which gave much wider authority to the

[1] Local Government Board *v.* Arlidge (1915), A.C., p. 120.

local council, and which substituted an appeal to the central department in place of that to quarter sessions, the learned law lord said he had no doubt "that the new procedure was intended to be an appeal to a superior executive body as such, and that it was not intended that the Ministry of Health should act in a purely judicial capacity". Nevertheless, he added, it must act "in a judicial temper", and must treat the matter "in a judicial spirit, availing itself of its wide powers solely for the purpose of carrying into effect in the best way the provisions of the Act". Its procedure need not be that of a court of law.

Lord Shaw of Dunfermline concurred generally with the views expressed by the Lord Chancellor, and paid particular attention to the plea put forward on behalf of Mr. Arlidge that he was entitled to get behind the formal pronouncement of the Ministry—that is, the Order confirming the Closing Order and the dismissal of the appeal against it—and "to ascertain which, in this great department of State, were the actual minds or mind which judged his case". This claim, which Lord Shaw referred to as "a grotesque demand to individualise the department for private purposes", was, he held, unjustifiable. The reasons he gave for dismissing the argument were that "it is not supported by statute, it would be inconsistent with past administrative practice, and it would not tend to, but might seriously impair, administrative efficiency". On nearly similar grounds Lord Shaw rejected the respondent's claim that he was entitled to an audience of the particular judge, or judges, of his appeal, when these had been identified, in order

that he might have a personal hearing which should survey the whole of the material available, and disclose the report made on the public local enquiry and the views put forward thereon, by the inspector who conducted it, for the guidance or consideration of the department. If such a disclosure were compulsory, said Lord Shaw, it would place a serious impediment upon "that frankness which ought to obtain among a staff accustomed to elaborately detailed and often most delicate and difficult tasks". The same argument would lead to a disclosure of the whole file containing the views of the entire hierarchy of inspectors, secretaries, assistants, consultants and other officials "who had considered the matter, many of whose opinions may differ, but all of which form the material for the ultimate decision". To reveal the process by which this corporate opinion was gradually evolved in the department would, he thought, be not only inconsistent with efficiency and existing practice, but also with the theory of Parliamentary responsibility for departmental action.

What clearly emerged from the decision of the House of Lords in the Arlidge case is that a government department entrusted by an Act of Parliament with the exercise of judicial functions need not follow the methods adopted by the courts, but may employ any rules which appear fair and convenient for the transaction of business.[1] Thus, an Administrative Tribunal need not furnish an appellant with the reasons for its decisions,[2] but may merely

[1] A. V Dicey: "The Development of Administrative Law in England," *Law Quarterly Review*, xxxi. p. 148.

[2] Lumley's *Public Health* (9th ed.), vol. i. p. 599.

announce the conclusion, whereas it is the strictly-followed custom, in the superior courts of justice at any rate, to explain at length the reasons which have led the judge to form his decision. Nor need particulars be furnished of the evidence on which the conclusions of the department are based. Again, the decision of a government department exercising judicial functions need not be conclusive, as in the case of a court. The enquiry may be reopened at any time by the department and the decision revised.[1]

On the other hand, the complete immunity from legal liability which is enjoyed by ordinary judges when acting in their official capacity may not always be held to extend to those who are primarily administrators but nevertheless engaged in judicial functions.[2] Some limitation to the application of the broad principle of complete judicial immunity may in the view of the courts prove to be necessary. Also the rule that a fair opportunity be given to each party to present his case is one which will invariably be applied to every tribunal, no matter how wide its powers or how complete its discretion.[3] This may include a right of replying to statements made by an opposing party.[4]

Seldom have the provisions of an Act of Parliament involving issues of far-reaching constitutional importance been interpreted in a more generous and broad-minded spirit than that manifested by the House of Lords in the Arlidge case, or with less regard to narrow-minded legal pedantry. For

[1] Parsons *v.* Lakenheath School Board (1899), 58 L.J. (Q.B.), p. 371.
[2] Everett *v.* Griffiths (1921), 1 A.C., p. 631, at p. 659.
[3] Board of Education *v* Rice (1911), A.C , p. 175.
[4] R. *v.* Housing Appeal Tribunal (1920), 3 K.B., p. 334.

good or for evil, a government department was from then onwards to be entitled to carry out its judicial functions in the most free and informal manner possible consistent with elementary ideas of justice, unfettered by conventional restrictions as to method and procedure. Henceforth, the government offices in Whitehall were, within their prescribed sphere, to take their place side by side with the courts of law, not merely as fact-finding agencies, but also as interpreters of the law; as wielders of final and absolute authority rather than as the producers of mere provisional conclusions subject to review in the royal courts of justice; as the possessors of methods of investigation and adjudication as valid within their own province as the processes which for centuries had been carried out by the judges in their courts.

No restriction was imposed save that attention should be paid to that curious entity known as "natural justice". It was said in one case that "it is impossible to lay down the requirements of natural justice",[1] but the phrase is actually employed to denote two or three elementary principles which, according to English ideas, must be followed by all who discharge judicial functions. Thus, it is "against natural justice" to arrive at a decision before both parties have had an opportunity of stating their case. No one must be condemned unheard. The word "natural" can hardly be taken to mean primitive, or refer to characteristics found among savage tribes, for anything less "natural" in that sense, or more peculiarly the product of a developed state of society, than the

[1] R. *v.* L.G.B. (1911), 2 I.R., p. 331.

idea that a decision should be delayed until the person concerned has been given an opportunity of being heard, it would be impossible to discover.

The principles laid down by the law lords in the Arlidge case have been applied to a much wider sphere than the judicial activities of the Minister of Health, or even of government departments generally, though it was with such bodies that the House of Lords was primarily concerned. Thus, the Judicial Committee of the Privy Council advised the Crown, employing the very terms used in the Arlidge case, that the Lieutenant Governor of a Canadian province, in issuing Crown grants of land upon "reasonable proof" of certain facts, was performing a judicial function which required him to "preserve a judicial temper".[1] A similar conception was applied to so remote an authority as the Governor of Trinidad, when transferring "on sufficient ground shown to his satisfaction" the indentures of immigrants from one employer to another.[2]

THE COMMISSION ON AWARDS TO INVENTORS

In what has been said above in regard to Administrative Tribunals I have, with few exceptions, confined myself to the judicial powers possessed by Ministers of the Crown, responsible to Parliament and the Cabinet, and exercising their functions through great departments of State employing hundreds or thousands of officials, or through Administrative Tribunals nominated by Ministers

[1] Wilson *v.* Esquimalt and Nanaimo Railway Co. (1922), 1 A.C., p. 202.
[2] De Verteuil *v.* Knaggs (1918), A.C., p. 557.

and directly or indirectly controlled by them. But this simplicity of type disappears on a close investigation; and we find ourselves confronted by a mass of tribunals, public or semi-public in character, which have large adjudicating functions to perform, yet which are neither courts of law on the one hand, nor Administrative Tribunals created by governments on the other hand. There is, for example, a body like the Royal Commission on Awards to Inventors, which was appointed to determine what sums should be paid to inventors by the Government in respect of the use by the Crown of their inventions during the war of 1914–1918.[1] A judge of the High Court was appointed Chairman of the Commission, which is, as the Commissioners themselves pointed out in their first report, "an obviously independent tribunal". The Royal Commission was established to supersede the Treasury,[2] which had previously been given the task of settling the amount of compensation which was to be paid by a government department to an inventor whose invention had been used by the department. The Commission refused to accept the view that the designation of the Treasury originally as the deciding authority meant that the adjudicating body was to have "a statutory bias" against inventors claiming from the Crown.[3] The basis of award, they said, was to be a "fair and reasonable price" based on a "fair and impartial adjudication".

Nevertheless, the Royal Commission on Awards

[1] Royal Commission on Awards to Inventors; see 1st Report, Cmd. 1112/1921.

[2] Patents and Designs Act, 1907, sec. 29.

[3] Cmd. 1112/1921.

to Inventors, despite its judicial chairman, is a tribunal whose work has been done in a manner very different from that followed by an ordinary court of justice, whether in regard to patent cases or any other type of dispute. Thus, in attempting to discover the exact meaning of "a fair and reasonable price"—that elusive phrase which for centuries has ensnared the minds of men and led them again and again into an impenetrable forest of mental confusion—the Royal Commission was driven to take into their reckoning a series of social and economic considerations of an elaborate and complex character which no English court of law would dream for a moment of investigating in an ordinary case. Should the basis of remuneration be a royalty? Should a royalty basis (if allowed) be maintained even where, owing to enormous numbers of an article being manufactured, the amount payable to the inventor would bear no relation to the technical merit of the invention? Should attention be paid to the personal position of the inventor?[1] Questions of this kind, involving conceptions of economic justice which would not be admissible in the trial of a private claim in an ordinary court of law, have played an important part in determining the awards of the Royal Commission. So much we know from the commissioners' own report, although they have followed the usual method adopted by Administrative Tribunals of not stating the reasons for their decisions in individual cases.

[1] Cmd. 1112/1921, p. 5.

THE LAW OFFICERS AND PATENT APPEALS

Since very early times the law officers of the Crown have advised the King on matters connected with the granting of monopolies, and the establishment of the Patent Office has left their authority in the matter largely untouched. One of the ordinary duties of the Attorney-General and Solicitor-General is to hear appeals from the decision of the Comptroller-General of Patents to refuse or accept patents, or applications for patents, in certain cases.[1] Here is an instance of a Minister of the Crown personally hearing appeals against the action of a government department. The decision of the law officer is final, there is no appeal to the courts, and neither prohibition[2] nor certiorari will lie. Owing to the fact that he is a trained lawyer, the procedure of the law officer in hearing patent appeals approximates more closely to the practice of the regular courts of justice than does that of other ministers who are called upon to exercise judicial functions through their departments, and he not only gives appellants a personal hearing, at which counsel or patent agents appear, but also gives reasoned decisions and publishes volumes of reported cases on which a definite body of law has been built which is carefully followed by successive law officers. But nevertheless the law officer is not a court in the formal sense of the word, but an Administrative Tribunal.

[1] Patents and Designs Act, 1907, secs. 3 (3), 6 (4), and 7 (4).

[2] R. *v.* Comptroller-General of Patents (1899), 1 Q.B., p. 909. *In re* Van Gelder's Patent (1888), 6 R.P.C., p. 22. G. Stuart Robertson: *Civil Proceedings by and against the Crown*, p. 125.

THE WAR COMPENSATION COURT

An interesting example of an Administrative Tribunal undergoing a change of status, was the body (analogous to the Commission on Awards to Inventors) set up during the war of 1914–18 to determine what compensation should be paid to persons in the United Kingdom who had suffered loss or damage through Government interference for war purposes. This body started life in 1915 as a Royal Commission—the Defence of the Realm Losses Royal Commission was its full title—the members of which were appointed on the recommendation of the Chancellor of the Exchequer.[1] The Commission was "to inquire and determine, and to report what sums . . . ought in reason and fairness to be paid out of public funds to applicants" in respect of loss or damage sustained through interference with their property or business by the Government in the exercise of its duties in defending the realm.[2] A King's Counsel and two other members were appointed to the Commission,[3] and given power to call for information, or to have access to books or documents, and to make personal visits of inspection where desirable.

This Commission had to adjudicate upon nearly six thousand applications, in which claims for

[1] An excellent account of the origin and work of the Commission and the War Compensation Court is given by D. du Bois Davidson (the secretary) in an article in the *Journal of Public Administration*, January 1927.

[2] See Report, 1916, cd. 8359, vii. p. 1.

[3] Sir James Woodhouse, formerly M.P. for Huddersfield and subsequently a member of the Railway and Canal Commission, and Sir Matthew Wallace, formerly President of the Scottish Chamber of Agriculture.

£13,500,000 were made, and in 1920 it was transformed into the War Compensation Court,[1] presided over by a judge of the High Court. A subtle change of status was involved in this promotion in rank;[2] and it can no longer properly be said that the War Compensation Court is an Administrative Tribunal, the members of which could apparently be appointed and dismissed at will by a Cabinet Minister, as was the case with its ancestor the Royal Commission.

Various other bodies of a similar nature were set up during the war to deal with special claims arising out of the unusual necessities of the time. Thus, in August 1915, for example, the Government established the Defence of the Realm (Licensed Trade Claims) Commission to deal with compensation for exceptional interference with the liquor trade.[3] Another special tribunal was the Admiralty Transport Arbitration Board, which dealt with disputed claims arising out of the hire of shipping requisitioned by the Government. This tribunal, which was presided over by Lord Mersey, was a most remarkable body. It had a name, but no local habitation and no staff; its work was conducted for eight years by some four members with great success, at no public expense, and with a complete absence of records which makes it impossible to give an account of its activities.[4]

[1] Indemnity Act, 1920. The law was considerably changed by this statute.

[2] Among other alterations, the court was empowered to take evidence on oath and the provisions of the Arbitration Acts were applied as regards the attendance of witnesses and the production of documents.

[3] See Report, Cmd. 1265/1921. Also Davidson, *Journal of Public Administration*, January 1927, pp. 98-99.

[4] D. du Bois Davidson: "War Compensation", *Journal of Public Administration*, January 1927, pp. 110-111.

Where one of the parties to a dispute is a government department, it sometimes happens that a tribunal is set up which consists not merely of government officials or nominees, but also of individuals appointed by the other side. Thus, in regard to "differences of opinion" arising between the Minister of Health and a local authority in respect of deficiencies of income resulting from insufficient rents being charged for new municipal houses, or lack of economy in carrying out rehousing schemes, the question was referred to a special tribunal consisting of two members nominated by the Minister and two others nominated by associations of local authorities.[1] This tribunal had power to settle not only what rents should be charged, but also what amount should be paid to the local authority from the national Exchequer.

CONCLUSION

We have now travelled a considerable distance away from the simple type of Administrative Tribunal with which the earlier part of this chapter was concerned: namely, the government department armed by Act of Parliament with judicial powers analogous to those normally carried out by the courts of justice. During the course of the description we have made

[1] The tribunal was first set up in reference to rehousing schemes under the Housing Act, 1919, or Parts I. and II. of the Housing of the Working Classes Act, 1890. Its constitution is contained in the Local Authorities (Assisted Housing Schemes) Regulations, 1919, Statutory Rule and Order, 1919-20/2047, as amended by S.R. and O. 1921/330, dated 12/3/1921. The members representing the local authorities consist of one member nominated by the Association of Municipal Corporations, and two members (of whom only one is entitled to act in any particular case) nominated by the Urban District Councils Association and the Rural District Councils Association jointly; a chairman is appointed by the members so nominated.

our way through a veritable maze of adjudicating bodies of all kinds—from Royal Commissions awarding compensation for inventors to Housing Tribunals fixing rents. The structure of all these bodies—and those we have described above do not exhaust the whole number that exists—varies enormously in character and complexity; and so does the precise nature of the function to be carried out. Whatever else may be said of our enquiry, it is scarcely one which is remarkable either for the simplicity of the phenomena under observation, or the homogeneous nature of the social institutions with which it is concerned.

There is one characteristic which is, however, common to all the various tribunals with which we have so far been dealing: namely, the fact that they are all of a public or official nature. That is to say, they all either form part of or are connected with the central government, responsible to a sovereign Parliament elected on a democratic territorial franchise, as in the case of an administrative department of State such as the Board of Education; or they are constituted through the action of a public administrative agency, such as a department of the Government, as in the case of the Umpire under the Unemployment Insurance Acts, or the Royal Commission on Awards to Inventors, both of whom are appointed by, or on the recommendation of, Ministers of the Crown. All these Administrative Tribunals are, in fact, of the sort that may shortly be termed official or governmental. There is some public control, potentially at least, over the appointment and tenure of office of the member or members (or some of them) of the tribunal, no matter

how small or ineffectual or remote that control may be in practice. This alone is sufficient reason to warrant their being grouped together under a single designation. The most suitable group title appears to be "Administrative Tribunals"—the word administrative being here, as before, taken to refer particularly to the administration or conduct of public affairs. An Administrative Tribunal is the title frequently used in the United States to denote a board or officer which has power to try questions of law and fact, and to make a decision thereon binding on private persons and affecting private rights ; [1] and we can employ the term here in much the same sense.[2]

A whole series of questions of considerable importance is raised by the mere enumeration and description of all these Administrative Tribunals. Why have they arisen ? Are they an improvement on the courts of law ? Do they tend to threaten or preserve the liberty of the subject ? What are their advantages and disadvantages ? Are they increasing in number ? Do they promote the social welfare ? Have we developed in England a system of administrative law comparable to that existing on the Continent, and if so, is it a good thing ? These, and a score of other questions, spring to the lips and demand an answer.

I may not be able to produce final and conclusive answers to all these questions, but I shall

[1] See W. H. Pillsbury: "Administrative Tribunals", 36 *Harvard Law Review*, p. 407. Mr. Pillsbury gives many examples of these bodies in America in his interesting article.

[2] I have deliberately excluded from this treatise all consideration of the Industrial Court, because its lack of compulsory powers places it in a different category from the tribunals hereinbefore described. I nevertheless regard the work of the Industrial Court as of very great significance.

at any rate endeavour to face the main issues involved. Before, however, attempting to analyse the causes which have led to the rise of this mass of Administrative Tribunals, or endeavouring to evaluate the results which they have produced, it is desirable that we should first complete the survey of judicial institutions which has here been attempted.

In order to do this it is necessary to remember that so far all mention has been omitted of those bodies which have for long possessed authority to make decisions of an important kind closely affecting the livelihood and social opportunities of millions of citizens, but which, nevertheless, have no connection, direct or indirect, whether with the courts of law on the one hand or the administrative arm of the government on the other hand.

I refer to the jurisdiction exercised over their members by nearly all the vast number of voluntary societies into which it has become the custom for men and women living in Western countries to group themselves. These groupings, based on the voluntary co-operation of individuals for the purpose of organising a profession, following an occupation, playing a game, enjoying a common social life, or attaining some other desired object, are distinct from the compulsory organisation of citizens on a geographical basis with which we have previously been dealing; and the judicial organs, the deciding authorities, may be similarly distinguished. I shall refer to those belonging to voluntary associations based on functional grouping as Domestic Tribunals—an unsatisfactory term, no doubt, but one which possesses the merit of suggesting an

antithesis to the official flavour of "Administrative Tribunals". I propose to devote the following chapter to a survey of these Domestic Tribunals, and to an examination of the vast powers which they wield.

CHAPTER IV

Domestic Tribunals

Voluntary Associations—Their Judicial Functions—Their Organs of Justice—The Attitude of the Judicature—Natural Justice—Immunity from the Courts—Vocational Organisations—An Absence of Control—Conclusion.

VOLUNTARY ASSOCIATIONS

The association and co-operation of human beings in voluntary groups is one of the most important facts of social development. As life becomes more highly organised and complex, the groups formed by men and women associating freely for particular purposes increase in number, size, power and diversity. In England to-day, for example, it is impossible even to enumerate the countless thousands of voluntary associations which exist for one purpose or another.

These societies exist for the most part with the object of furthering a purpose common to the members, and of protecting the interests of the members in the fulfilment of that purpose. The purposes of voluntary societies extend over a vast field, ranging from the profession of a religion to the playing of bowls, from the pursuit of a gainful occupation to the furtherance of archæological research, from the promotion of vegetarianism to the

mere sharing in common of a club-house and social amenities.

The legal status of these bodies varies in English law according to the nature of their origin. Thus, a trading group, if it is created in accordance with the statutory provisions of the Companies Acts, will in law become a corporation, and stand possessed of all the privileges attaching to the anthropomorphic personality with which our lawyers have invested such bodies. It will be only a partnership if the relations of the individuals are crystallised in a deed of partnership. An organised body of scientists may receive a charter from the Crown and become incorporated thereby; or they may remain a mere voluntary society, hardly recognised by the law of England. The legal status of a group is often a matter of considerable consequence, particularly in England, where very little legal recognition is given to the myriads of unincorporated societies which exist, despite the dominant part which they play in many spheres of the national life.[1]

But we shall not here be concerned with the manner in which the legal status of these bodies is differentiated. For the purpose we have in hand they may all be regarded as functional groups, and we may think of them as voluntary associations (though it may not always be correct in strict law [2] to describe them as such) in order to distinguish them from the compulsory association of citizens in various forms for the divers purposes of the State.

[1] English law only recognises two kinds of juristic person or entity, an individual and a corporation.

[2] The term "voluntary association" is often reserved to describe specifically those societies which are unincorporated.

The fact that a body is generically a voluntary society does not necessarily mean that every member has joined it of his own spontaneous desire, or even of his own free will. A man cannot practise at the bar unless he is a member of one of the Inns of Court, nor get a job in a strongly organised trade unless he is a member of the appropriate trade union; and in these and similar cases entry into the occupation necessitates membership of the voluntary association. On the other hand, most people join a club or a learned society of their own free will, not because they are virtually compelled to do so in order to attain a desired end, but because it is likely to be pleasurable or profitable or of assistance in furthering ends which are already pursued by the individual through other channels.

All that is implied by the conception of a voluntary association is, in fact, the idea of a group that was *originally* created by the voluntary coming-together of free persons for the furtherance of a common purpose, and the embodiment of that coming-together in some more or less permanent and tangible institution. This is the mark and sign of the true voluntary society, and often enough, indeed, the only "voluntary" element to be found remaining in the coercive, ruthless, arbitrary and autocratic bodies which sometimes pass by that name in Western countries.

The name denotes, then, a vast number of free-born groups which are continually coming into existence, functioning with a greater or less degree of effectiveness, and dying; which vary infinitely in size, importance, wealth, power and longevity; which pursue a multitude of diverse purposes; and

which often compete, consciously or unconsciously, for the allegiance of the men and women who belong, or who might belong, at one and the same time to several groups pursuing unco-ordinated ends. Sometimes the particular specimen is frail and ludicrous; and we smile at the spectacle of the local skittles club, with its twopenny-halfpenny subscription, constant altercations, and early demise. But we do not smile when the Miners' Federation threatens to call out a million men on strike in the event of certain economic changes occurring. Taken in the aggregate, the voluntary associations, with a membership roll running into hundreds of millions and a huge accumulation of property, present a formidable array of power; and their activities extend into almost every field of human activity—economic, professional, religious, educational, political, scientific, athletic, artistic, social, and one knows not what else.[1]

THEIR JUDICIAL FUNCTIONS

All this is by way of introduction, in order to suggest the full scope of what Sir Frederick Pollock refers to when he speaks of the "divers persons and bodies called upon, in the management of public institutions or government of voluntary associations, to exercise a sort of conventional jurisdiction analogous to that of inferior courts of justice".[2] For here we come to the relevant point of this disquisition; which is, that all these voluntary associations exercise very extensive judicial powers over their members.

[1] An interesting essay on the place of voluntary associations in the State has been written by Mr. H. J. Laski in his *Foundations of Sovereignty*.

[2] *The Law of Torts* (12th ed.), p. 125.

One of the fundamental characteristics of a voluntary society is the notion that it should be autonomous, and that its powers of self-government should not be interfered with save in exceptional circumstances. What those powers are will depend in every case on the constitution of the association, which is to be found in the rules of membership, or in the royal charter, or in the memorandum or articles of association, or in the provisions of the empowering statute, or sometimes even in the persistent record of history or the low murmur of tradition. But these powers of self-government are usually considerable in extent.

The power to exclude from membership persons regarded as not suitable or desirable is one of the most elementary powers possessed by nearly all voluntary associations, save in the case of a few bodies which exert entire control over a profession or occupation and which, as a result, are compelled by law to admit to membership individuals possessing specified qualifications, unless good reason to the contrary exists. But this ability to refuse admittance is not so much a jurisdiction exerted over the members themselves as a kind of negative power to exclude the rest of the world.[1]

Much more important is the right to expel a person who is already a member for an offence against the common code of conduct prescribed by the society. This, indeed, is the most severe penalty which can be imposed by a voluntary association. To be expelled from a vocational association may mean economic disaster; to be turned out of an

[1] A very effective negative jurisdiction in some cases; for example, to be blackballed by a club may be extremely injurious from a social point of view.

exclusive club may ruin a man socially. We shall deal with this matter at greater length later on.

The ability to exclude and expel are not the only kinds of penal power commonly possessed by voluntary associations. A member may be penalised under the constitution by the withholding of financial or other benefits to which he would normally be entitled, as in the case of a trade union; or the organisation may withdraw the protection or support or assistance which it is in the habit of affording to members. Again, members who infringe the rules may sometimes be called upon to pay a fine, which will often be paid regardless of whether it is legally recoverable or not. Finally, an individual may be subjected by his fellow-members to various subtle forms of social ostracism while still retaining all the tangible or formal privileges of membership.

THEIR ORGANS OF JUSTICE

Nearly every voluntary association has some judicial organ which is charged with the task of hearing complaints against a member, of arriving at a decision concerning his innocence or guilt, and of determining what rule applies or what penalty, if any, should be imposed. In some cases it may be a single person who is appointed to discharge the judicial function, as in the case of the vice-chancellor of a university; in others it may be the whole body of members. The most common case of all is to find the executive committee armed with authority to enquire into and determine the matter, but sometimes a special appeals or discipline committee exists for the purpose.

All these organs of authority, armed with power, essentially judicial in its nature, to hear and determine an immense number of questions closely affecting the rights and duties of individual members, may be designated Domestic Tribunals, in contradistinction to the courts of justice on the one hand and Administrative Tribunals on the other. In the following pages I propose to discuss the nature of their jurisdiction, and the manner in which it is or should be, in the eyes of the law, exercised.

THE ATTITUDE OF THE JUDICATURE

What is the attitude of the courts of law toward these Domestic Tribunals?

The first thing to be noted is that the courts of law decline to interfere in any way with the authority of a Domestic Tribunal unless some kind of property right is involved. The foundation of the overriding jurisdiction of the courts in regard to voluntary associations is the right of property vested in the members, of which they may be deprived by unlawful or unjust expulsion. There is no jurisdiction, said the judge in a leading case on the subject,[1] "to decide upon the rights of persons to associate together when the association possesses no property. Persons, and many persons, do associate together when the association possesses no property. A dozen people may agree to meet and play whist at each others' houses for a certain period, and if eleven of them refuse to associate with the twelfth any longer, I am not aware that there is any jurisdiction in any court of justice in this country to

[1] Rigby *v.* Connol (1878), 14 Ch.D., p. 482.

interfere. Or a dozen or a hundred scientific men may agree with each other in the same way to meet alternatively at each others' houses, or any place where there is a possibility of their meeting each other, but if the association has no property, and takes no subscriptions from its members, I cannot imagine that any court of justice could interfere . . . if some of the members declined to associate with some of the others. That is to say, the courts, as such, have never dreamt of enforcing agreements strictly personal in their nature, whether they are agreements for the purpose of pleasure, or for the purpose of scientific pursuits, or for the purpose of charity or philanthropy."

In this connection, one may add, the term "property" is used apparently in a wide sense, and must be taken to include, for example, the right to practise an occupation.

Where property rights are involved, the courts regard the proceedings of the tribunal as being "in the nature of judicial proceedings, although the forum is a domestic one".[1] But despite the fact that the body is "acting judicially",[2] the courts do not, generally speaking, go further than to require that the principles of what they term "natural justice" shall be followed, and certain other elementary conditions satisfied. If the Domestic Tribunal departs from "the ordinary principles of justice"[3] it does so at its peril, and is liable to have its decision set aside and declared void by the court.

[1] Leeson *v.* General Council of Medical Education (1889), 43 Ch.D., p 366, Bowen, L.J.

[2] *Ibid.* Cotton, L.J. [3] Fisher *v.* Kean (1878), 11 Ch.D., p. 353.

NATURAL JUSTICE

The principle of natural justice[1] is that a man shall not be removed from office or membership, or otherwise dealt with to his material disadvantage, without fair, adequate, and sufficient notice being given to him of what is alleged to his detriment, and of having an opportunity of meeting the accusations which are brought against him. In no circumstances may a man be deprived of any part of his property by a tribunal without having an opportunity of being heard and making his defence.[2] The courts are extremely zealous in the enforcement of the maxim *audi alteram partem*,[3] and there are innumerable cases in the reports where decisions have been quashed on this account.

A typical example was the attempted expulsion of the late Mr. Labouchere from the Beefsteak Club. The committee of the club called upon Mr. Labouchere, who was a member, to resign on the alleged ground that his conduct was injurious to the interests of the club. He refused, and a general meeting of all the members was summoned and a resolution for expelling him moved and carried. The court to which Labouchere appealed held that the committee acted without full enquiry, and without giving the plaintiff notice of a definite charge, with the result that the resolution purporting to expel him was bad and of no force.[4] More

[1] See R. *v.* Chancellor of Cambridge, Strange I., p. 566, in which Fortescue, J., explained why "the laws of God and man both give the party an opportunity to make his defence."

[2] Capel *v.* Child (1832), 2 C. and J., p. 558.

[3] Wood *v.* Wood (1874), L.R. 9 Ex., p. 190.

[4] Labouchere *v.* Earl of Wharncliffe (1879), 13 C.D., p. 348.

recently a member of the Bath Club who was expelled without being given a hearing was awarded substantial damages against the club. In one case the expulsion of a member from a women's club was held to be invalid merely because one of the fourteen members of the committee (a lady of title who had only consented to stay on the committee on condition that she was not bothered) had not received a notice of the meeting of the committee at which the question of the member's conduct was to be considered.[1] This rule has been widely applied, not only to clubs, trade unions, and other voluntary associations, but also to various tribunals and bodies of persons invested with authority to adjudicate upon matters involving pecuniary consequences to individuals.[2] Thus, for example, where the master of a school who had been appointed under a trust deed by three vicars, was served with a notice of dismissal signed by two of them, and it was proved that no meeting of the three vicars had taken place to discuss the matter, it was held that the master could not be removed from his post without having an opportunity of being heard by all three clergymen.[3] In another case, the rules of a police pension society in Montreal provided that every application for a pension should be fully investigated by the Board of Directors, and that any member who was dismissed or obliged to resign should have his case considered by the board as regards a right to pension. A certain member of the force was obliged to resign, and the directors,

[1] Young *v.* Ladies' Imperial Club (1920), 2 K.B., p. 523.
[2] Wood *v.* Wood (1874), L.R. 9 Ex., p. 190
[3] Fisher *v.* Jackson (1891), 2 Ch., p. 84.

without any "judicial enquiry" into the circumstances, refused his claim to pension "seeing that he was obliged to tender his resignation". The Judicial Committee of the Privy Council held that the resolution of the directors was bad and that the case must be considered afresh by a different board.[1]

In this case, as in Labouchere's and many others, the precise rights of the member depended on the rules of the society as well as on the common law conception of natural justice; but the underlying idea is that the mind of the tribunal is not and cannot be sufficiently informed to arrive at an equitable decision unless, first, the person whose case is being considered has a chance to make a statement to the tribunal, and secondly, each and every member of the tribunal has an opportunity (of which he may or may not avail himself) of consulting with and influencing his colleagues in their joint decision. This conception is quite antithetic to the idea of counting heads; for if a tribunal consisted of fifty persons, of whom forty-nine were present and unanimously agreed on the decision, that determination would, nevertheless, be invalid if the fiftieth member was excluded from the deliberations. The decision is regarded as the common determination of the tribunal as a whole, as in the case of judgments in a court of law, and the mere preponderance of opinion in a given direction, however overwhelming numerically, is not in theory conceived of as being impervious to the wisdom of an absent Solomon. The minds of adjudicators, no matter how little acquainted they

[1] Lapointe *v.* L'Association de Bienfaisance et de Retraite de la Police de Montréal (1906), A.C., p. 535.

may be with legal ideas or the spirit of justice, are supposed to be unlike those of party politicians: that is, they must not be made up before the debate, but must remain liable to be shaken by cogent reasoning or persuasive oratory.

IMMUNITY FROM THE COURTS

There are two other conditions which are imposed by the courts on the proceedings of Domestic Tribunals. The first of these is that the tribunal must not exceed its jurisdiction, but must carefully confine itself within the scope of its authority, whatever that may happen to be. Lord Justice Bowen, referring to the power given to the General Medical Council to erase from the register the name of any medical practitioner who was found, after due enquiry, to be guilty of "infamous conduct in any professional sense", remarked that the only thing that the courts could investigate when proceedings of this kind were brought before them, was whether the domestic tribunal had acted within its jurisdiction. There must, he said, be an allegation of infamous conduct before the Council could act at all in the matter.[1] This question of jurisdiction is obviously one which depends on the circumstances of each case; and in particular on the terms of the enabling instrument under which the tribunal derives its power, such as an Act of Parliament, or the rules of a voluntary society, or the clauses of a charter.

The other condition which is laid down by the

[1] Leeson *v.* General Council of Medical Education (1889), 43 Ch.D., p. 366.

courts for the conduct of judicial proceedings by Domestic Tribunals is that the members of the adjudicating body must be free from certain forms of bias arising from interest. We have already discussed in an earlier chapter the question of bias in regard to the performance of judicial functions by courts of law,[1] and it seems clear that similar considerations apply to Domestic Tribunals.

A case recently came before the courts in which a patent agent was concerned. The Admiralty complained to the Chartered Institute of Patent Agents that a certain member (the plaintiff) had disclosed details of a secret invention, and the Council of the Institute thereupon referred the matter to its Discipline Committee as a question involving "disgraceful professional conduct". The Council later applied to the Board of Trade[2] (under some old rules) to secure erasure of the plaintiff's name from the register of Patent Agents, and when this failed they proceeded to act under the terms of their own charter, whereby a person was liable to expulsion from membership of the Institute for an act or default discreditable to a patent agent. The Council which took action in this connection was composed of members who had taken an active part in the earlier proceedings with the Board of Trade. The plaintiff was expelled from the Institute, but the courts subsequently declared the expulsion invalid on the ground of bias. "Each member of the Council," said Mr. Justice Eve, "in adjudicating on a complaint is performing a judicial duty, and he must bring to the discharge of that

[1] See Chapter II.

[2] Under Rule 19 of the Register of Patent Agents' Rules, 1909.

duty an unbiassed and impartial mind. If he has a bias which rendered him otherwise than an impartial judge he is disqualified from performing that duty. Nay, more (so jealous is the policy of our law of the purity of the administration of justice) if there are circumstances so affecting a person acting in a judicial capacity as to be calculated to create in the mind of a reasonable man a suspicion of that person's impartiality, those circumstances are themselves sufficient to disqualify, although in fact no bias exists." [1]

But it appears that the learned judge, in speaking of the " unbiassed and impartial mind " which the members of a tribunal are required to bring to their task, was referring mainly to those more obvious and tangible forms of impartiality, such as freedom from financial interest in the controversy, the prohibition against a person acting both as an accuser and as a judge, and so forth, which are required of all adjudicators and which we have discussed in an earlier chapter.[2] He cannot have been referring to any of the more subtle and less tangible psychological attributes of impartiality, for the rule is that, providing the members of a domestic tribunal do not infringe the simple provisions relating to natural justice which have been referred to above, and provided they keep within their jurisdiction, they are, speaking generally, free to arrive at whatever decision they choose. The court will not interfere, no matter how prejudiced mentally the tribunal's point of view may be, or how narrow its reasoning, or how inequitable the result. It

[1] Law *v.* Chartered Institute of Patent Agents (1919), 2 Ch., p. 276.

[2] See Chapter II.

has been laid down again and again that the decisions of Domestic Tribunals will not be reviewed by the courts, unless the rules or constitution or conditions of membership of the constituent body have not been followed by the tribunal, or unless the formal requirements of which we have already spoken have been departed from, or some obvious form of malice or corruption manifested by the members. The deliberations of the tribunal, and the resulting determination, are normally immune from investigation.

The freedom which is thus given to a Domestic Tribunal to mete out justice according to its own lights, and subject to no external control, is a fact which confers great power on these bodies in the exercise of their judicial functions. The courts have confirmed the authority of such tribunals on many occasions. A century ago a case came before the courts in which the Crown sought to compel the Bishop of London to "approve and license" (as required by the Act of Uniformity) a clerk chosen by the inhabitants of the parish of St. Bartholomew in London to fill an endowed lectureship at the parish church. It was held by the courts that no mandamus would lie to compel the Bishop to license a candidate of whom he did not in his own conscience approve, no matter how unreasonably his conscience might work in matters of this kind. The court, in short, would not "approve" for him.[1]

A similar power of unlimited discretion was declared by the courts to be possessed by the directors of a joint-stock company engaged in manufacturing a well-known brand of china, who

[1] R. *v.* Bishop of London (1812), 15 East, p. 117.

had power under the articles of association to refuse to register a transfer of shares where it was not proved to their satisfaction that "the proposed transferee is a responsible person" or "a desirable person to admit to membership". The court held that, in the absence of evidence that the directors had not acted *bona fide* in refusing to register a transfer, a refusal on their part to regard a person as desirable or responsible could not be questioned.[1]

VOCATIONAL ORGANISATIONS

No less conclusive are the powers of determination possessed by the Domestic Tribunals of vocational organisations. Thus, if a medical practitioner is, after due enquiry, judged by the General Council of Medical Education and Registration to have been guilty of "infamous conduct in any professional respect", and the registrar has been directed to erase his name from the register,[2] the court will neither enquire into the matter, nor interfere with the decision.[3] Yet action of this kind will often spell economic ruin and professional ostracism for a man whose only sin may have been the adoption of scientific ideas antithetic to those of his more backward colleagues.

A person who is not a legally qualified medical

[1] *In re* Coalport China Co (1895), 2 Ch., p. 404.

[2] 21 and 22 Vic. c. 90, sec. 29: "If any registered medical practitioner shall be convicted in England or Ireland of any felony or misdemeanour, or in Scotland of any crime or offence, or shall, after due enquiry, be judged by the general council to have been guilty of infamous conduct in any professional respect, the general council may, if they see fit, direct the registrar to erase the name of such medical practitioner from the register."

[3] *Ex parte* La Mert (1863), 4 B. and S., p. 582; Allbutt *v.* General Council, etc. (1889), 23 Q.B.D., p. 400.

practitioner may, however, continue to practise as a doctor subject only to one or two legal disabilities, such as being unable to sue for his fees or sign a death certificate. But in the case of certain occupations, new offences have been created on the criminal side of the law, liability to punishment in respect of which is controlled by the professional association governing the vocation. Thus, the Patents, Designs and Trade Marks Act prohibits a person from describing himself as a patent agent unless he is registered as such in the manner laid down, and a fine is imposed as a penalty. Here, as Lord Herschell, L.C., pointed out, for the first time a new offence is created—the offence of practising as a patent agent without being on a register which is largely controlled by the profession.[1]

A jurisdiction of a most drastic nature is possessed by the Committee of the London Stock Exchange over its members, who are elected periodically by the Committee. During the war of 1914–18 a certain naturalised British subject of German origin with a very good record as a British citizen was not re-elected to the Stock Exchange, of which he was a member—an act equivalent to expulsion. He brought an action against the Committee of the Stock Exchange, who are responsible for the election of members, and who had decided to exclude practically all members who were naturalised British subjects of German origin. The House of Lords decided that the court had no jurisdiction to interfere with the decision, as the Committee had *bona fide* exercised the discretion

[1] Institute of Patent Agents *v.* Lockwood (1894), A.C., p. 347, Lord Herschell, L.C., at p. 361.

conferred on them by the deed of settlement and the rules, and had not been shown to have acted arbitrarily or capriciously.[1]

In another Stock Exchange case of a similar character, the learned Chancery judge observed that where power is confided to a tribunal, the discretion that the tribunal may exercise must be used "according to the rules of reason and justice, not according to private opinion; according to law and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular."[2] But it is difficult to feel that this statement is in practice anything more than a pious hope of what ought to be rather than a declaration of what is, when we recall the fact that the decisions of Domestic Tribunals are in effect not subject to review except where the principles of "natural justice" have been violated. A member of the Court of Appeal, in the leading case of Leeson *v.* General Council of Medical Education,[3] said that if it was once established that a complaint made before the Council was one in respect of which they possessed jurisdiction, then the court "ought not to look at the evidence or in any way consider whether they have arrived at a right conclusion."

A Domestic Tribunal, moreover, is under no obligation to give reasons for its decisions;[4] and it is difficult to understand how it can be known whether the members are acting according to "private opinion" or according "to the rules of reason and justice", when all that they are required

[1] Weinberger *v.* Inglis (1919), A.C., p. 606.
[2] Cassel *v.* Inglis (1916), 2 Ch., p. 211, Astbury, J.
[3] (1890), 43 Ch.D., p. 366.
[4] Cassel *v.* Inglis (1916), 2 Ch.D., p. 211.

to do is merely to announce their conclusion without explaining the mental processes or the chain of reasoning which have led up to it. In a case similar to the one we have mentioned above, where company directors armed with power to approve persons desirous of becoming shareholders, had refused to transfer shares to a certain individual, a learned Lord Justice said he could not conceive that anyone could accept office as a director, or exercise the power entrusted to him, if he were liable to be called upon to say what were the particular reasons or the particular motive which had influenced him in concluding that a person was not eligible as a shareholder. "The conclusion of the directors", he remarked, "in the absence of any suggestion or evidence to the contrary, we must, of course, take to be a *bona fide* conclusion on their part that, for some reason or other connected with the interests of the Company, they did not think it fit to recognise that gentleman as a transferee."[1] He added that the directors were well advised in not permitting themselves to be interrogated as to what particular reasons they might have for personally objecting to the individual concerned.

AN ABSENCE OF CONTROL

It will be seen from this that although the statement is often made by judges that Domestic Tribunals or persons given power to make decisions affecting other persons must act honestly and in good faith, in practice this dictum does not mean much more than that if malice or corrupt motives can be *proved*,

[1] *In re* Gresham Life Assurance Society, *ex parte* Penny (1872), L.R., 8 Ch., p. 446.

the decision will be declared void and set aside.[1] But otherwise the justice or correctness of the decision will not be questioned or even investigated. The tribunal or authority is presumed to have acted *bona fide* in the absence of proof to the contrary, and since no reasons for the decision are required, a complainant is placed at an enormous disadvantage if he wishes to get a decision reviewed by the courts, for the burden of proof falls on him, and nothing is harder to prove than corrupt motive. We do not think, therefore, that the counsels of perfection which have been laid down by the courts as to the manner in which Domestic Tribunals should perform their judicial duties constitute a serious modification of the general rule that, apart from questions of bias, jurisdiction and natural justice, the deliberations and decisions of Domestic Tribunals escape all survey by the courts of justice.

Occasionally, it is true, we find that a statutory provision provides that controversies relating to professional conduct shall be subject to review by the courts of law on appeal instead of being finally determined by a Domestic Tribunal. Thus, in the case of the solicitor's profession, admission is granted by the Master of the Rolls on the production of a certificate from the Law Society to the effect that the applicant has passed his final examinations and fulfilled other specified conditions; and practising certificates are then issued by the Society acting in the capacity of Registrar of Solicitors. If a complaint of improper conduct is made against a solicitor, an enquiry is con-

[1] Leeson *v.* General Council of Medical Education (1890), 43 Ch.D., p. 366.

ducted by a Statutory Committee consisting of members of the Law Society nominated by the Master of the Rolls. If a *prima facie* case is not made out, the Society need not proceed further with the matter; but if the complaint warrants closer investigation the Committee orders a full hearing, which is conducted like the trial of an action, the chairman swearing the witnesses, who are examined and cross-examined in the usual way. The Committee has power to strike a solicitor off the rolls, or to suspend him from practice, and may make orders as to the payment of costs. An appeal lies to the High Court, but the court has specifically stated that it will not lightly interfere with the discretion of the Committee.[1] It is significant of the general trend of events that prior to 1919 the disciplinary powers now possessed by the statutory Committee were exercised by a Divisional Court of the King's Bench, to which the Committee could only refer a complaint for hearing. In 1919 the legislature deliberately adopted the view that it was for the Law Society to keep its house in order.[2]

In the case of barristers, the jurisdiction is exercised exclusively by the professional organisations themselves—namely, the Inns of Court, which are unincorporated voluntary associations of great antiquity, unregulated by statute. The judges of the High Court are said to exercise an overriding jurisdiction as visitors; but every High Court

[1] Solicitors Acts, 1843, 1888, secs. 12 and 13; 1919, secs. 5-8. As to procedure see Statutory Rules and Orders, 1923/329, 1923/328, 1924/1582; Halsbury, *Laws of England*, vol. xxvi. pp. 849, 853-855, and Supplement, para. 1380.

[2] See *re* a Solicitor (No. 2) (1924), 93 L.J. (K.B.), p. 761.

judge is a member of the Bench or governing body of one of the four Inns of Court, and the courts as such never interfere in cases where barristers are disbarred for misconduct.

The Midwives Act, 1902, which set up a Central Midwives' Board composed of representatives appointed by various medical and nursing associations, local authorities, and the Lord President of the Council, with power to strike off the name of a midwife from the roll of midwives and to suspend her from practice, is another case where the court is given a statutory jurisdiction over the right to expel members from their occupation. The Act gives to any woman thinking herself aggrieved by a decision of the Central Midwives' Board, a special right of appeal to the High Court of Justice. But had this right of appeal not been expressly given the position of midwives would not have differed materially from that of barristers and doctors, or any other group of persons who are subject, as regards their profession, to the final and conclusive jurisdiction of the vocational association which regulates the occupation.

The limitations which the courts have imposed on their own competence to enquire into the deliberations and decisions of Domestic Tribunals is echoed in some cases by an analogous inability on the part of the court to compel the tribunal, or rather the functional group of which the tribunal is an organ, to carry out any decision other than the one arrived at by the Domestic Tribunal itself. Thus, the courts have often been exceptionally anxious to prevent members of trade unions from being expelled or deprived of vested benefits merely because they

have been found guilty by the Domestic Tribunal of having committed an industrial offence against the union. Hence, where a union has purported to expel a member on that ground, judges of the High Court have frequently granted what is called a declaration of membership, which in effect declares that the plaintiff is still a member of the union. But the Trade Union Acts[1] prevent a member of a trade union which is in restraint of trade from suing the union in a court of law in order to enforce directly, or recover damages for the breach of, any agreement for the application of the funds of the union to provide benefits to members. The result is that the most that the court can do, when it wishes to set aside a decision of this kind made by the Domestic Tribunal of a trade union, is to declare that a workman remains a member of the union and still stands possessed of rights which are usually legally unenforceable.[2] The impotence of the courts here is, however, somewhat exceptional in that it is determined by statute, though the statute in this connection merely embodies disabilities which existed at common law.

Sir Frederick Pollock suggests that the decisions of Domestic Tribunals must be arrived at with a view to the common interest of the society or institution concerned;[3] but since it is the tribunal itself which determines what the common interest of the institution demands, it can scarcely be said that this carries the matter very much farther, or affords in practice any serious check to the power of the tribunal.

[1] Trade Union Act, 1870, sec. 4.
[2] But see now the Trade Disputes and Trade Unions Act, 1927, sec. 2.
[3] Pollock on Torts, pp. 125-126.

The ability which is possessed by Administrative Tribunals to regulate their own procedure, and to adopt any method which may suit them for the conduct of their judicial business, extends equally to Domestic Tribunals. It has been openly declared by the Court of Appeal that a body such as the General Medical Council is not in a position to receive anything which could be regarded by a lawyer as evidence but can only consider statements made by each side in support of the case before them.[1]

CONCLUSION

From what has been said in the foregoing pages, it can be seen that there are in England, apart from the regular courts of justice and the Administrative Tribunals, a vast number of Domestic Tribunals exercising an extensive power of decision over a great variety of matters closely affecting the lives of millions of individuals; that the authority of these tribunals within their jurisdiction is recognised by the courts; and that for the most part that authority is uncontrolled. In certain exceptional circumstances the courts will interfere, but those circumstances arise only when what may be regarded as the framework within which the proceedings are carried on is abused. Provided that a Domestic Tribunal follows certain elementary rules, its decision is not subject to review, and the members are protected from civil liability.[2]

[1] Leeson *v.* General Council of Medical Education (1890), 43 Ch.D., p. 366, Cotton, L.J.

[2] Pollock, *op. cit.*

CHAPTER V

The Judicial Mind

The Psychological Background—The Need for Consistency—The Need for Equality—The Need for Certainty—The Rule of Reason—The Technique of Impartial Thought—The Artificial Reason of the Law—The Exclusion of Imponderables—Judicial Discretion—The Good Judge—Conclusion.

THE PSYCHOLOGICAL BACKGROUND

We have now surveyed a large number of judicial institutions of all kinds, including not only formal courts of law, but also Administrative Tribunals and the judicial organs of voluntary associations and professional organisations. We have seen that many persons exercise judicial functions besides those who are called judges, and that mere titles are inadequate as a guide for discovering where the judicial function resides.

Forty years ago an American judge was quite clear as to what were the essentials required "to administer justice judicially." All that was wanted, he said, was a judge attended by a clerk, a sheriff and a marshal; a right to compel attendance before the court; two parties to a controversy; a wrong done or threatened, or a right withheld; a hearing or trial; and then judgment followed by such

enforcement as might be necessary to enable the courts to " subserve the ends of their creation." [1]

But we know to-day that judicial institutions do not by themselves suffice to produce justice. What is called the administration of justice requires not merely the establishment of organs of justice, such as courts of law or other tribunals, but also, and perhaps more importantly, that the matters to be adjudicated upon shall be decided by a particular process. That process is the judicial process. It consists in the application of a body of rules or principles by the technique of a special method of thought, and in the presence of certain psychological elements. In the Arlidge case Lord Haldane spoke of the need for officials to " act judicially ", to conduct themselves with a sense of responsibility, and to carry out their duties " fairly and judicially "; Lord Moulton referred to the necessity for preserving " a judicial temper ", and of treating appeals " in a judicial spirit " ; but none of the learned law lords made any attempt to explain what these phrases mean in terms either of law or of logic or of psychology. Sir Claud Schuster, the permanent secretary to the Lord Chancellor, remarked recently, in giving evidence before a Royal Commission, that there is a great deal of administration where the administrator is bound to exercise, or ought to exercise, a judicial mind, although what he is doing is administrative and not judicial. " If that can once be grasped ", he added, " none of the rest matters." But although Sir Claud Schuster had himself grasped the importance of the judicial

[1] Fuller *v.* County of Colfax, Circuit Court of U.S.A., District of Nebraska (1882), 14 Fed 177.

mind, he followed the example of the learned law lords in making no attempt to analyse or describe its nature.[1]

In the following pages I shall endeavour to discover what is in fact meant by the judicial spirit. With that object I shall analyse the process which takes place when a judge in a court of law decides a controversy brought before him. We can then see to what extent the underlying conceptions have been applied by administrators and others engaged in performing judicial functions; and we shall in consequence be in a better position to evaluate the body of administrative law which has recently grown up in England, and which we have described in the foregoing pages. We cannot intelligently assess the worth of new constitutional machinery for administering justice unless and until we know whether or not that machinery results in the fundamental elements of the judicial process finding expression.

In Xenophon's *Cyropædia*, Astyages asks Cyrus to give an account of his last lesson. Cyrus answers thus: "One of the boys of our school had a coat too small for him and gave it to one of his companions, a little smaller than himself, and forcibly took in exchange the latter's coat, which was too large. The preceptor made me judge of the ensuing dispute, and I decided that the matter should be left as it was, since both parties seemed to be better accommodated than before. Upon this the preceptor pointed out to me that I had done wrong, for I had been satisfied with considering the con-

[1] Royal Commission on Local Government, 1923, Minutes of Evidence, part ii, Q. 6457, p. 429.

venience of the thing, whereas I ought first to have considered the justice of it." This story is said to exemplify the difference between adjudication and administration.[1]

Whether or not that be true, it is clear that the preceptor, when he asked Cyrus to act the part of judge, was calling upon the youth to make a greater effort of mind than that involved in the mere following of his undisciplined impulse. Justice dealt out according to the first impression of the case, what Sir Frederick Pollock calls the " natural justice " of an Eastern king sitting in the gate,[2] may be just tolerable if the community is small enough for the whole administration of justice to be in the hands of one man whose impulses are fairly consistent, and who possesses an interest in the public welfare ; but in more complex circumstances, where the judicial function is distributed among various individuals of divers temperaments and conflicting impulses, the disadvantages of such a method are overwhelming.

A judge of the Supreme Court, or a justice of the peace, swears that he will " do right to all manner of people after the laws and usages of this realm without fear or favour, affection or ill-will." The doing of right is to be after the laws and usages of the country, not according to the dictates of the judge's personal impulses. Even an arbitrator must decide according to law, and not according to what he may consider fair and reasonable in the

[1] Xenophon: *Cyropædia*, Book I. (iii.); see also Bentham: *Theory of Legislation: Principles of the Civil Code*, vol. i. ch. xvi., Oxford University Press edition. Cf. Roscoe Pound: "Administrative Application of Legal Standards", 44 American Bar Association Reports, pp. 454-456.

[2] Sir F. Pollock: *First Book of Jurisprudence*, p. 42.

circumstances.[1] The decision of the judge may, then, not be arbitrary or absolute, but must be exercised in conformity with "the laws and usages of this realm". Let us see what this involves.

THE NEED FOR CONSISTENCY

In order to understand the judicial process it is necessary to consider its evolution. In a primitive community there is often no written or authoritative body of law, but a code of conduct may, nevertheless, be closely followed. Similarly, if a power to determine matters on which a difference of opinion has arisen is vested in an official or in a tribunal, the psychological process of habit and the need for a measure of uniformity or consistency will tend to produce something like a set of rules or principles to serve as a guide for future decisions. Even where the power of the official to decide as he pleases is unfettered to begin with, a tendency to lay down self-limiting rules can usually be observed. The system of equity administered by the Lord Chancellor was originally an arbitrary interference with the common law, but even before the end of the seventeenth century it had commenced to grow into a system of fixed law.[2] Similarly, in many departments of administration where no law or custom is laid down, the disposition in human beings towards order results in self-prescribed laws being formulated. This tendency may be observed even in the most unlikely fields.

[1] Jager *v.* Tolme (1916), 1 K.B., p. 939; Russell: *Arbitration and Award* (11th ed.), *passim*.

[2] A. V. Dicey: *Law of the Constitution* (8th ed.), p. 376.

The royal prerogative of mercy, for instance, enables the King, acting constitutionally through the Home Secretary, to extend a pardon to any subject convicted under the criminal law, and in particular to remit sentences of capital punishment. Though, generally speaking, the question whether execution shall take place depends on such varied considerations that no general principles can be formulated, there are, Sir Edward Troup tells us, certain classes of cases where a rule has been laid down. Thus, for many years it has been held by the Home Office that the life of a person under the age of eighteen should be spared.[1] Again, the Home Secretary is the authority responsible for recommending awards of the Albert medal for exceptional courage displayed in civil life, and here, too, "the rule was formulated that it should be given only where the danger knowingly and voluntarily incurred for the purpose of saving life was so great that the rescuer survived 'almost by a miracle'".[2] That may not appear to be a very clear-cut rule, but it is still a rule for all that.

The urge towards this formulation of principles arises from the desire for consistency, which is a widely spread disposition among human beings, particularly in those who take part in the government of an organised community. Consistency is, however, not merely a subjective disposition existing among human beings, but an objective necessity which is required for all large-scale human co-operation. It is impossible to run a railway, or to organise a system of taxation, or to maintain any

[1] Sir Edward Troup: *The Home Office*, p. 65. See p. 223 *post*.
[2] *Ibid.* p. 33.

complex activity, unless those concerned can foresee the actions of other persons within relatively narrow limits. The desire for consistency is strengthened, moreover, when a sense of purpose underlies the class of activities to which it is applied. The Board of Inland Revenue, for example, has power to impose a fine up to £10 as a penalty for not stamping a document within the prescribed time. The revenue authorities are legally unfettered in their decisions, and could, if they desired, inflict the maximum amount for every offence. But in practice they have evolved an elaborate system of graduated penalties varying with the duration of the delay, the amount of duty to be paid, the cause of the omission, and the blameworthiness of the person in default.[1] The guiding purpose underlying the development of a consistent practice in this connection has been a desire to " make the punishment fit the crime ", to imbue defaulters with a sense of justice, and to bring pressure on persons to get their documents stamped within the proper time.

Consistency is not necessarily the same thing as uniformity, and may, indeed, be opposed to it. The idea of uniformity involves the notion of treating alike things which appear superficially to bear a resemblance to one another, regardless of whether they are in fact similar. Undeveloped systems of law are usually marked by the quality of uniformity rather than by that of consistency. Consistency prescribes a reasoned relation, in the first place between decisions for the same class of case at

[1] Sir Josiah Stamp : *Current Problems in Finance and Government*, pp. 60-62.

different points of time; in the second place, between different classes of case at the same point of time; and in the third place, between different classes of case at different points of time. There must be no disparity or conflict of purpose which is offensive to the reason throughout the jurisdiction at any point of time or space. The act which is a crime on Monday must remain punishable on Tuesday; the rule which is binding in Surrey must apply equally in Northumberland.

It is this desire for consistency that is at the bottom of that respect for precedent which is so marked a feature of English law. The binding authority of past decisions arrived at by the superior courts is really nothing more or less than an endeavour to make the system of law prevailing at any given moment self-consistent in all its parts; and we find that even the House of Lords, which as the highest court in the land is subject to no overruling authority save that of an Act of Parliament, submits voluntarily to be bound by its own decisions.

But the desire that continuity shall prevail in the treatment of disconnected matters is not confined to those who perform judicial functions. A principle of consistency, as Sir Josiah Stamp points out, enters not only into the procedure of a law court, but also into the administration of a government department. The administration, unlike the legislature, cannot discriminate between classes. "Any discretion it has at all has to be exercised as a distinction between cases evenly and smoothly over all classes. Thus you have running down from the top to the bottom this obligation to uniformity or

principle of consistency." [1] One of the great problems in the modern state is, indeed, how to secure consistency in the field of public administration without creating a mass of rules which actually result in a mere wooden uniformity.

Enough has been said to show that of all the elements in the judicial process none is more fundamental than the urge towards consistency, and the tendency towards the formulation of rules and principles which that urge produces. The entire study of the law is, in the words of Judge Cardozo, an enquiry into "the principles of order revealing themselves in uniformities of antecedents and consequents. When the uniformities are sufficiently constant to be the subject of prediction with reasonable certainty, we say that law exists." [2]

The danger of Administrative Tribunals is said to lie in the fact that if the members of a tribunal are too closely subordinated to the government of the day they may tend to arrive at decisions which they think may please the particular party in power, regardless of the larger duty which they owe to the principle of consistency. But there is no evidence that up to the present this has occurred in the case of Administrative Tribunals in England.

The disposition towards consistency is, we might venture to say, one of the deepest urges of the human mind; the whole mass of our scientific knowledge has arisen from a craving to discover a consistency in the nature of things, a series of stable relations between phenomena, on which we can rely. Science, in short, is based on a desire to

[1] Sir Josiah Stamp: *Current Problems in Finance and Government*, pp. 56, 59. [2] B. D. Cardozo: *The Growth of the Law*, pp. 37-38.

discover that the universe behaves consistently ; and the consistency which marks the judicial attitude is only a special manifestation of that larger consistency which exerts so strong an attraction over the human mind in other departments of life.

Professor John Dewey goes so far as to suggest that the whole mechanism of our thinking is only a reflection on a larger scale of the process by which judgments are formed in the courts.[1] In all spheres of life where we are required to form a judgment, a process takes place similar to the determination of a legal dispute. There is, first, a controversy, consisting of opposing claims regarding the same objective situation ; second, the business of defining and elaborating these claims, and of sifting the facts adduced in support of them ; third, a final decision is arrived at. " The judgment ", writes Dewey, " when formed is a *decision*. This determination not only settles that particular case, but it helps fix a rule or method for deciding similar matters in the future, as the sentence of the judge on the bench both terminates that dispute, and also forms a precedent for future decisions. If the interpretation settled upon is not controverted by subsequent events, a presumption is built up in favour of a similar interpretation in other cases. . . . In this way principles of judging are built up ; a certain manner of interpretation gets weight, authority." [2]

If this be a true analysis, as we think it is, of the working of the human mind, the tendency towards consistency lies buried very deep in human nature ;

[1] J. Dewey : *How We Think*, pp. 101-102, chapter on " Judgment : The Interpretation of Facts ".

[2] *Ibid.* p. 107.

and there is little reason to doubt that educated men of any type who are called upon to perform judicial functions will tend to build up a body of principles which will tend to approach consistency, regardless of whether they have the title of judge or the special training of lawyers.

THE NEED FOR EQUALITY

No less important than consistency as an attribute of the judicial spirit, and intimately connected with it in some ways, is the tendency towards equality.

Inequality before the law was the principle which prevailed in former ages. There were recognised differences of liability varying with the rank, age and sex of the offender.[1] But the marks of justice according to law in the modern sense are generality and equality.[2] The rule of law applies to the whole generality of citizens, and all men are equal before the law. This does not mean that everyone has similar rights, or a right to the same things; but all rights of the same kind are equal as between different individuals.

The judge, we have noted, swears to do right to all manner of men, showing neither favour nor ill-will. This leads to the principle of equality in that when a given set of facts or a particular group of individuals have been thrown into their appropriate legal categories, the judge must then apply to the individuals concerned the law that governs the

[1] L. T. Hobhouse: *Morals in Evolution*, p 77. See, as examples, the system of wergilds, or the code of Hammerabi.

[2] Sir F. Pollock: *First Book of Jurisprudence*, p. 37, *et seq.*

entire class of objects or persons situated in those circumstances. Here, indeed, we touch the very essence of what is meant by such phrases as "the impartiality of judges", for the implication of those terms is precisely that the judge shall as far as possible deal with the materials before him by categories, treating equally all the separate items within each category. Every purchaser who has been fraudulently deceived as to the goods which he has bought must be treated alike; there must be no discrimination between them on grounds of religion, or personal attractiveness, or wealth, or nationality, or excellence at golf. All petitioners for divorce must be subjected to the same rules of law; adultery cannot be excused in one respondent because of his laudable war record, or because he and the judge have a mutual friend. This disinterested treatment of each member of a legal category on similar lines, regardless of race, religion, antecedents, physical appearance, intellect, public spirit, or occupation, is the foundation of judicial impartiality. In this sense equality before the law may be said to have a real existence: incidentally, in this sense only, since individuals differ largely as to their legal rights and duties.

In order that equality before the law shall prevail, in the sense mentioned above, the judge is required to distinguish carefully between facts which are relevant to the issue and those which are immaterial. In the ultimate scheme of things everything is related in some way to everything else; but in this brief life of ours all systems of law postulate a strictly enforced duty of selection which aims at distinguishing the irrelevant from

the relevant. A sense of relevance is, indeed, an essential ingredient in the judicial mind.

In the daily procedure of the courts we can observe a continual exclusion from the attention of the judge, of physical, economic, social and moral facts, which are accounted of enormous importance in other departments of life, but which in law have often no significance. A manufacturer of ferro-concrete who treats his wife badly, lies to his children, bullies the servants and cheats at cards, is not on that account placed in a disadvantageous position in regard to a building contract. A woman who is negligently run down by a motor-car is not prejudiced in her action for damages because she has squandered her father's fortune, or ruined her husband's life. It is only in regard to conduct directly connected with the actual subject-matter of the dispute that moral considerations may influence the decision, and even then it is by no means always permissible. A judge who, in summing up a criminal charge, invited the jury to consider whether there was anything in the evidence which made the prisoner appear to be "the sort of person" who would be likely to commit an offence of the kind with which he was charged, was held to have acted improperly, and the conviction was quashed.[1] The basis for this decision was clearly the fact that the judge had not observed the relevance which the judicial mind requires.

The law itself, of course, often draws distinctions

[1] R. *v.* Marshall, 18 Cr. App. R., p. 164. But see R *v* George Joseph Smith (1915), Cr. App. R., p. 229 (the "brides in the bath" case) for an interesting application of the Aristotelian doctrine that successive acts make character, and that evidence of the whole series is therefore admissible in judging an isolated event.

based on moral grounds between cases which would otherwise call for equal treatment. A man who bets against his horse winning the Derby ought logically to be treated in the same way as a man who bets against the safety of his own cargo on a ship at sea. But the law regards one as a wager which it will not enforce, and the other as a contract of marine insurance.[1] The judge himself is often called upon to mete out unequal treatment to persons whose cases are indistinguishable save on moral grounds. The equitable jurisdiction of the Chancery judges is based on a whole series of moral axioms, such as "He who seeks equity must do equity", and "Who comes for equity must come with clean hands"; and in various other departments of the law moral inequalities are acknowledged to produce legal inequalities.

But nothing in all this touches the dominant fact that inequalities of rank, fame and fortune do not call for inequality of treatment from the judge. Here lies the fundamental difference between the mind which is imbued with the judicial spirit and the unjudicial mind. Three-quarters of the prevailing social discontent arises from the fact that in our economic system similar equality does not exist. The manufacturer who places his son in charge of the works because he is his son, the politician who secures a well-paid berth in the public service for the friend of a supporter, are not acting in a judicial spirit, for the simple reason they are not taking every man on his merits, regardless of distinctions of an economic or social character.

[1] Anson: *Contract* (14th ed.), p. 229.

The conception of equality before the law has implications of a far-reaching character little suspected by some of its most fervent advocates. It leads, by an inevitable logic, not merely to the political equality which we now possess, but also to certain kinds of economic equality entirely opposed to existing conditions.

The notion of equality before the law is, like the tendency towards consistency, not confined to judicial proceedings, but extends to many spheres of scientific thought and administrative activity. The very idea of a law involves the conception of a rule or principle which applies universally over a given field. All apples obey the law of gravity, all Andalusian hens follow the Mendelian laws of inheritance, just as all men are conceived of as being subject to the common law of the land.

This is particularly noticeable in the realm of public administration. The whole system of government administration in England to-day relies on an equality of treatment being meted out, and a potential equality of service being rendered, by the executive agent to all who fall within a particular category. Mr. Sidney Webb has pointed out that a modern democracy must cater essentially for minorities;[1] but the multiplication of categories does not prevent, and may actually promote, equality of treatment within each category. The law itself often insists upon administrative equality. In the granting of licences to enable motor-buses to ply for hire, for example, a local authority is required to act judicially and "must treat all applicants

[1] *The Necessary Basis of Society* (Fabian Society).

alike." [1] This does not mean that all applicants are entitled to obtain licences, but that all are entitled to have the same criteria applied to them: in short, to be taken on their merits, and not disqualified on account of irrelevant considerations.

Civil servants, then, no less than judges, are accustomed daily to apply the conception of equality before the law; and there is no reason to believe that administrative officials charged with the performance of judicial functions are nowadays more likely to be lacking in this attribute of the judicial spirit than the holders of judicial office. The tradition of equality was first founded in the courts of law, but it is now no less firmly rooted in the administrative system of the country.

THE NEED FOR CERTAINTY

It is not sufficient that the administration of justice should be consistent and equal in its treatment. It is necessary also that it should be certain. We cannot be sure that a principle or rule is being administered either consistently or equally at different times and in different cases, and within different areas, unless we know what the principle is. Hence it comes about that the judicial process requires the formulation and promulgation of a definite body of legal doctrine which can be ascertained by all who are subject to its rule. Sir Frederick Pollock, indeed, regards certainty as one of the distinguishing marks of justice according to law.[2]

[1] Rex *v.* Brighton Corporation, *ex parte* T. Tilling, Ltd. (1916), 14 L.G.R., p. 776

[2] *First Book of Jurisprudence*, p. 37 *et seq.*

The law must be known, or at least ascertainable, not only so as to enable the citizen to observe whether it is being administered consistently and equally, but also in order to enable him to comply with its provisions. The decisions of the judge must contain some measure of predictability. Even where the decision upon a particular set of facts is in doubt, there must be, in Judge Cardozo's words, " little doubt that the conclusion will be drawn from a stock of known principles and rules which will be treated as invested with legal obligation ".[1] It is this stock of rules and principles which is what we mean for most purposes by law. And the law must be ascertainable and certain.

So urgent is this need for predictability that Administrative Tribunals, no less than courts of law, have from time to time found it necessary to formulate the principles on which they intend to proceed. The department in the state of Minnesota concerned in the disposal of public land, and in the determination of controversies in which settlers are involved in connection with public land, has found, for example, that predictability is of great importance in the administration of the land system in the state. Before a settler spends time and money in endeavouring to comply with the public land laws, in order to acquire land, he wants to know exactly what is required of him. " It is of less importance to him what the requirements are ", observes an American writer, " than that he should know what they are, otherwise he may lose the benefit of all his efforts for failing to comply with a particular requirement which is relatively unimportant, and

[1] B. J. Cardozo : *The Growth of the Law*, p. 43.

with which he would have complied if he had known it in advance." [1] Accordingly the General Land Office, which discharges many judicial functions, has formulated a body of definite rules with which a settler may comply with confidence.

In England there has been a great reluctance on the part of administrative departments to announce publicly the principles which in many cases they have consciously followed for long periods of time, even where such principles have actually been formulated, and are in daily use in the office.

An example of this was the exercise by the Minister of Health of the powers entrusted to him under the Local Government Act, 1888. Under that Act [2] the Minister could (until 1926) if he considered it "desirable" issue a Provisional Order constituting a borough into a county borough, providing it had a population of not less than 50,000. He could also extend the boundaries of existing county boroughs.

This power was of immense importance in English local government, and between 1888 and 1925 enormous quantities of land, population and rateable value were transferred by successive Ministers from the county councils to the county borough councils—that is, from the great rural authorities to the municipal bodies governing the large towns. The only stipulation laid down by the statute was that the Minister should, as a general rule, hold a public enquiry in the locality, an enquiry which, in practice, was conducted by one of the engineering inspectors of the Ministry, who re-

[1] H. L. McClintock: "Public Land Controversies", *Minnesota Law Review*, 7, p. 639.

[2] Sec. 54.

ported confidentially to the Minister. In the evidence given recently before the Royal Commission on Local Government [1] it was revealed that, although the Minister was perfectly free to make any decision he might "deem expedient", he had actually laid down nine complex conditions which needed to be satisfied before he would make an order. Something analogous to a body of legal principles had been evolved in the department, which was more or less consistently followed by the Minister in making his decisions, although the local authorities had no right in law to enforce their observance. In this way a considerable measure of coherence and continuity were obtained, and the Minister's personal predilections scarcely influenced the matter one way or another.

But although a body of guiding principles had thus been formulated, their existence was not made public. No local authority knew how its application would be regarded, or what tests applied, or whether the tests would be the same for all areas and under all Ministers; nor what conditions it had to satisfy in order to attain county borough status or an extension of boundaries. The whole procedure was severely criticised, a lack of confidence was felt in the methods employed by the engineering inspectors in conducting local enquiries; and the net result was that the entire method, which possessed many advantages, was abolished, and the Provisional Order system swept away in contested applications. It is at least possible that, if the Ministry of Health had published an account of the

[1] Royal Commission on Local Government, 1925, Cd 2506, p. 157 *et seq.*

principles which had been formulated in the department, public opinion in local government circles would have been satisfied and reassured at finding a fairly stable body of rules in existence, and members of county councils would not have been so ready to believe that the Minister was strongly biased in favour of the large cities. It was the uncertainty and unpredictability of the determinations which to no small extent inspired a mistrust that ultimately became so powerful as to destroy the Minister's powers.

One of the weakest features of the whole system of administrative law in England is the disinclination of Administrative and Domestic Tribunals to enunciate clearly for the benefit of the public the principles which they intend to follow, and so enable their proceedings to take on an aspect of certainty which they cannot otherwise assume. Now and again an Administrative Tribunal will depart from this secretive habit of mind, and come into the open, as it were; but that is rare. The National Health Insurance Commission, for example, at quite an early stage of its existence, announced its belief that the approved societies which were subject to its jurisdiction would welcome "a series of Reports which may serve as precedents for their guidance in the future, and may at the same time illustrate the principles and procedure which should govern the decision of disputes between societies and their members".[1] There is reason to suppose that this declaration of faith was motivated more by a desire to frighten the approved societies into setting their

[1] National Health Insurance Commission's Reports of Decisions on Appeals, etc., 1915, cd. 7810, p. iii.

houses in order than by a love of the principle of publicity; but the result was no less desirable. The tribunals which decide disputed claims to Unemployment Insurance benefit publish the principles underlying their determinations, and in this way a body of certain law has been built up. But these are exceptional instances, and the great majority of tribunals do not disclose the principles, if any, which in practice they follow.

This secretiveness may no doubt be traced, to some extent, to a desire to avoid laying down a set of rules or principles which would gradually bind the tribunal as strictly as a court of law, and thereby curtail the very freedom which we shall see later is one of the reasons for the tribunal's existence. Secrecy, it may be felt, is necessary to maintain flexibility. The decision of the tribunal emerges *ex cathedra*, and none can question its wisdom, since none can know the considerations which moved the mind of the authority. Every word which lays down a clear and certain principle narrows the future freedom of choice of the tribunal.

Such a view is in the long run a misguided one. What is wanted is a reasonable degree of certainty as to the outlook of the tribunal *at any given time*; and certainty in this sense is not incompatible with growth and change. It may be true, as Learned Hand, J., one of the most distinguished American judges, has remarked, that Administrative Tribunals which are charged with the execution of wide legislative purposes "establish upon them a customary law through the slow accretion of their own precedents".[1] But the value of such a body of

[1] "The Speech of Justice", xxix. *Harvard Law Review*, p. 620.

customary law is lost if the knowledge of its character is withheld from the public.

THE RULE OF REASON

The growth of certainty in the law is closely associated with not only the drawing up of a body of principles, but also with the convention which requires judges in the higher courts to give reasons for their decisions. It is difficult to imagine a body of law possessing the certainty which we nowadays expect growing up in a civilised country if judges were merely to announce their decisions without any statement of the reasons on which they were founded. A striking illustration of this is provided by the experience of the Federal Trade Commission in the United States. This Commission is an Administrative Tribunal set up to secure fair dealing in American business life, and to prevent abuses arising from large-scale monopoly and combination. The Commission possesses very large judicial powers, and consists of a large department employing hundreds of lawyers and other expert officials.

The Federal Trade Commission was intended to explore and develop a new field of law centring round the regulation of private business enterprise, and to build up a body of economic jurisprudence. But hitherto the Commission has not adopted the practice of giving reasons for its decisions, or explaining why it accepts one contention and rejects another. There is, as a result, Mr. Gerrard Henderson tells us in his excellent book,[1] a wide-

[1] *The Federal Trade Commission: A Study in Administrative Law*, pp. 334-335.

spread complaint that at present it is impossible to discover from the published decisions of the Commission what points were decided, and what were the grounds for the decision. It would, he continues, greatly enhance the justice and quality of the Commission's decisions if narrative and descriptive findings were given, containing the grounds for the decision and the reasons for rejecting or accepting arguments. The Federal Trade Commission was expected to establish precedents for guiding business men and lawyers, but, observes Mr. Henderson, "I do not see how this important duty can be performed, unless the Commission is ready to publish its decisions in such form that the reader can tell what has been decided, and by what reasoning the decision is supported ".[1]

The achievement of certainty is not the only advantage to be obtained from requiring judicial authorities to justify their conclusions by describing the chain of reasoning whereby they are reached.

" Good laws ", said Jeremy Bentham, " are such laws for which good reasons can be given. On the part of a legislator whose wish it is that his laws be good, who thinks they are good, and who knows why he thinks so, a natural object of anxiety will be, the communicating the like persuasion to those whom he wishes to see conforming themselves to those rules. On the part of a judge whose wish it is that his decisions be good, who thinks them so, and knows why he thinks them so (it is only in proportion as he knows why he thinks them good that they are likely to be so), an equally natural object of anxiety will be the communicating the

[1] *Ibid.*

like persuasion to all to whose cognisance it may happen to them to present themselves; and more especially to those from whom a more immediate conformity to them is expected." [1] The giving of reasons, Bentham urges in this striking passage, serves in effect the important purpose of helping to persuade those who are affected by a decision that it was a right one. There is a lack of conviction, an apparent arbitrariness, about a decision which is unsupported by an account of the reasoning process on which it is based, that is liable to create an impression that the judicial authority making it is an autocratic body uninformed by the judicial spirit. Sir Edward Troup, for many years Permanent Under-Secretary of State in the Home Office, referring to recommendations for mercy made by juries in trials for capital offences, tells us that "great weight is always given by the Home Secretary to a recommendation by a jury if some sufficient reason be given for it. A mere recommendation without any reason carries much less weight." [2]

Generally speaking, it is only the judges who sit in the superior courts of law who are required by tradition to state the reasons for their decisions, and administrative authorities and other bodies who perform judicial functions (and even magistrates of the inferior courts) are not under a similar obligation. But this generalisation is subject to exceptions. Thus, the War Compensation Court does not publish reasons for its awards; and the Royal Commission on Awards to Inventors, although pre-

[1] Bentham: "Rationale of Judicial Evidence", *Works*, vol. 9, p. 357.
[2] Sir E. Troup: *The Home Office*, p. 68.

sided over by a judge of the High Court, has never made a practice of giving reasons for its recommendations. On the other hand, various administrative authorities exercising judicial functions, such as the District Auditor, are required to explain the reasons which lead to their decisions. Lord Halsbury, when Lord Chancellor, stated definitely that licensing justices, though acting administratively in law, had been given a discretion the limits of which they were not to evade "by avoiding a plain exposition of the reasons on which they act".[1]

The obligation to give reasons for the conclusion may have an important influence, not only in persuading those who are affected by the decision that it is a just and reasonable one, but also in developing the mental capacity and sense of fairness of the adjudicator. A young man about to take up a minor judicial appointment in a distant colony is said to have been advised by a retired official always to state his conclusions, but never to give reasons in support of them. "For", said the latter, "your conclusions will usually be right, but your reasons will usually be wrong." It is possible that the administration of justice could be carried on without serious trouble in a primitive community by instinctive methods such as were here advocated, but neither a coherent body of law nor the evolution of the type of mind fitted to discharge judicial functions in a progressive and complex society is likely to be developed by shirking the effort of discovering "good reasons" for what Bentham called "good decisions".

What we advocate, therefore, is that all Adminis-

[1] Sharp *v.* Wakefield (1891), A.C., p. 173.

trative Tribunals, and other bodies performing judicial functions, should be required invariably to describe the reasons on which their decisions are founded. The reasons, like the decisions, may be good or they may be bad, the premises from which the argument starts may be true or false, the inferences unwarranted, and cause confused with effect; but the obligation to evolve a chain of reasoning which must stand the strain of criticism and discussion, is desirable from the point of view of promoting a sense of the judicial spirit in the adjudicator no less than in importing certainty into the body of the law.

THE TECHNIQUE OF IMPARTIAL THOUGHT

We observed above that a judge in court must give reasons for his decision. The jury, on the other hand, are not permitted to state the reasons on which they base their verdict, and even if they wish to do so the judge will decline to listen.[1]

Paradoxical though it may seem, both these rules aim at a common purpose: namely, the development of a coherent and impersonal body of law. The judge puts the trained mind of a lawyer on to the case, and is able to reason to the conclusion in terms of legal technique. The juryman, extracted for a brief moment from the quarry of laymen in which he normally has his being, is not equipped to express either his thoughts or his feelings in a manner consistent with the body of the law. So, like the young colonial judge, he is advised to give his conclusions only.

[1] Halsbury: *Laws of England*, vol xviii. p. 259.

The habitual treatment of a series of phenomena with a view to the furtherance of a single purpose produces effects of the utmost importance to the human intellect. If a group of men work continuously at an art, or a craft, or a science, or a trade, a special method of thought and a special type of language is almost certain to arise amongst them. "The mental outlook of any group of persons similarly occupied", writes Mr. Delisle Burns, "is naturally the same; this is reflected in their very language. Carpenters have a special language of their own, including words which are not used by ordinary men, for the parts of doors and windows. Seamen have their own language; railwaymen have theirs." [1] I was myself closely interested in flying during the vital period of growth from the beginning of 1912 until the end of the war in 1918, and clearly recollect the way in which a special type of thought and a characteristic language came into use among those engaged in aviation in the course of a few years.

No one, as Mr. Graham Wallas observes,[2] consciously invented these various types of thought. They nevertheless play a part of great importance in the development of the subjects to which they relate. This is particularly the case in those fields of activity which, in the broadest sense of the word, comprise the sciences.

There is an increasing tendency in modern times to lay more stress on the methods of thought which characterise a science than on the laws or principles or conclusions which at any given moment con-

[1] C. Delisle Burns: *Industry and Civilisation*, p. 258.
[2] Graham Wallas: *The Art of Thought*, p. 171.

stitute the existing body of knowledge. "Science is not wrapped up with any particular body of facts", writes Professor J. Arthur Thomson, "it is characterised as an intellectual attitude."[1] "Statistics", declares Professor Bowley, "I regard as a method rather than as a science."[2] A similar view of economics is held by some of its leading exponents. Thus, Mr. John Maynard Keynes remarks that economic science is "a method rather than a doctrine, an apparatus of the mind, a technique of thinking, which helps its possessor to draw correct conclusions".[3] Sir Josiah Stamp expresses a similar opinion when he says that "economics strictly is not so much a body of knowledge as a mode of thought",[4] and he adds that it is one thing to be acquainted with the latest conclusions in any body of knowledge, and quite another to possess its technique and be able to apply its teachings.[5]

Despite certain fundamental differences between civil law and natural science, law shares with the sciences the quality of possessing, in its developed stages, a special method of thought common to those who practise it and a special language for expressing that thought. This is notably the case with English law, which is, as Dean Roscoe Pound puts it, "a mode of treating legal problems rather than a fixed body of definite rules".[6]

On November 10, 1612, Lord Chief Justice

[1] J. Arthur Thomson: *Introduction to Science*, p. 58.
[2] A. L. Bowley: *The Measurement of Social Phenomena*, p. 4.
[3] J. M. Keynes: Introduction to *Money* by D. H. Robertson, p. v.
[4] Sir Josiah Stamp: *Current Problems in Finance and Government*, p. 6
[5] *Ibid.* p. 10.
[6] Roscoe Pound: *The Spirit of the Common Law*, p. 1.

Coke advised King James I. that by the law of England the king could not in person adjudge a cause. "But", said the king, "I thought law was founded upon reason, and I and others have reason as well as the judges." "True it is", Coke replied, "that God hath endowed his Majesty with excellent science and great endowments of nature; but his Majesty is not learned in the laws of his realm of England, and causes which govern the life or inheritance or goods or fortunes of his subjects are not to be decided by natural reason, but by the artificial reason and judgment of the law, which law is an art which requires long study and experience before that a man can attain to the cognizance of it."[1] Science, like law, is founded upon reason, and others besides scientists are endowed with reason; but the problems of chemistry and mathematics and biology and medicine are, like the problems which arise in legal controversies, to be settled not by "natural reason" but by "artificial reason and judgment".

What we are concerned to suggest here is that the need for an "artificial" method of thought arises in those departments of life where it is desirable that judgment should be formed without haste or emotion. The administration of justice was the first activity in which it became essential to obtain the kind of impartiality which is based on a suppression of personal emotion, and a willingness to suspend judgment until a systematic exploration of the ground has been made; but the psychological processes involved have spread with the rise of civilisation from one field to another. The

[1] 12 Cope's Reports, p. 63.

"artificial" methods of thought employed by all who have to make sound judgments, whether in courts of law or in laboratories or on wholesale produce markets, or elsewhere, are rooted in a desire to attain the impersonality which is a necessary accompaniment of the judicial spirit. The sense of fairness which we associate with the judicial mind implies an ability on the part of the judge to exclude from his estimation, in dealing with the case before him, every tendency to bias arising from emotional disturbances. In this respect law joins hands with science. We no more expect a judge to be influenced by the fact that one of the parties in a case has red hair, however much he may dislike that colour, than we expect an Australian professor of physics to be influenced, in examining a new theory of matter, by the fact that it is put forward by a Japanese scientist.

Continuous mental effort to suppress or to exclude rigidly all subjective considerations of an emotional kind tends then to create methods of reasoning which are "artificial" in the sense that they demand an unnatural objectivity and the suppression of a large number of important instincts. The reasoning on which the judgment is to be formed becomes, as we say, impersonal. It selects certain significant facts from an objective situation, and ignores the other aspects of the matter. The methodological procedure of modern science is "exclusive and intolerant. . . . It fixes attention on a definite group of abstractions, neglects everything else, and elicits every scrap of information and theory which is relevant to what is retained." [1]

[1] A. N. Whitehead: *Science and the Modern World*, p. 250.

All parts of an experience are equally present, but they are not all of equal value to the adjudicator.[1] Thus to the statistician a given individual is a unit in a group or in a defined series of mathematical terms; to the bacteriologist the same individual is a living anthropoid in whom certain conditions of bacterial immunity or infection are present or absent; to the engineer he is a creature for whose weight, height, physical movements, and capacities regard must be paid in the shaping of hard materials. To the lawyer he is the subject of certain rights and duties which may be enforced in the courts. Legal technique, as M. Gény puts it, establishes a general scheme within which the actual facts of social life must find a place, and to which they must to some extent accommodate themselves.[2]

THE ARTIFICIAL REASON OF THE LAW

John Smith, living in a suburban villa on the outskirts of a city, is never, from the lawyer's point of view, a man of unique personality, who differs in the last resort from all other human beings. The colour of his eyes, his disposition to exaggerate, the peculiar way in which he brushes his teeth, his habit of whistling when asleep, his liking for apricot jam, his interest in pigeon flying, the subtle blend of dislike and admiration with which he regards his domineering wife, his ambition to secure a seat on the local council, the mingled pride and apprehension which he feels towards his strong-minded son: in

[1] Cf. John Dewey: *How We Think*, p. 102

[2] François Gény: "Freedom of Decision", in *The Science of Legal Method*, p. 9, Modern Legal Philosophy Series, Macmillan, N.Y., 1921, trans. E. Bruncken. This volume contains several brilliant and suggestive essays

all this the lawyer takes for the most part no interest, save in so far as it may occasionally serve to establish facts in law. They are all important facts so far as John Smith is concerned as a human being, but in themselves they are of no legal consequence. What is legally significant about John Smith is the fact that he is a Vendor, a Purchaser, a Ratepayer, a Trustee, a Master, a Servant, a Contractor, a Tortfeasor. If he is the victim of a criminal injury, or himself commits a crime, he will, it is true, be just John Smith *simpliciter*, a participant in universal rights and duties, and no special category will be assigned to him; but he will still, as it were, be deprived of his uniqueness and robbed of his diversity.

This pulverisation of a sentient being into a mere series of categories is an illustration of the classifying process which is going on continually in judicial proceedings, not only in regard to persons, but also in regard to places, things, and events. The examples are infinite in number. A telephone is a "telegraph" within the meaning of the Telegraph Acts, and a conversation through the telephone is a "telegram";[1] winkles are "fish" for the purposes of the Larceny Act;[2] a chauffeur is a "member of the working classes" under the Housing Acts;[3] a room in a hotel from which a local pageant can be seen passing through the street is a "place of entertainment" for the purpose of Entertainment Tax.[4] Lawyers look at the complex and moving realities of social life from a

[1] Attorney-General *v.* Edison Telephone Co. (1880), 6 Q.B.D., p. 244.
[2] Leavett *v.* Clark (1915), 3 K.B., p. 9.
[3] White *v.* St. Marylebone Borough Council (1915), 3 K.B., p. 249.
[4] Gibson *v.* Reach (1924), 1 K.B., p. 294.

special angle, and submit those realities to artificial processes which transform, and sometimes deform, their effective nature. All manner of phenomena, which are variable and uncertain by nature, are cast into a firm and unchanging mould, and change their shape by passing through what M. Gény calls "the crucible of the law".[1]

The method adopted by the lawyer of selecting certain facts attaching to things or persons or events and classifying them in the categories which are alone significant to him, and then dealing with the case on the basis of that classification to the exclusion of other phenomena which he deems irrelevant, is precisely similar to the methods adopted by specialists in a large number of other fields of activity.

"Consider", says Dr. Whitehead, "the lives of John Wesley and of Saint Francis of Assisi. For physical science you have in these lives merely ordinary examples of the operation of the principles of physiological chemistry, and of the dynamics of nervous reactions: for religion you have lives of the most profound significance in the history of the world."[2] And similar abstractions are to be found throughout the whole realm of systematic thought. To an economic statistician the most obvious "lines of division" for human beings appear to be "civil condition", such as married, unmarried, divorced, or widowed, or by economic classes, such as landowner, capitalist, entrepreneurs, and employed; or, according to occupation, or

[1] François Gény: "Freedom of Decision", in *The Science of Legal Method*, p. 9, Modern Legal Philosophy Series, Macmillan, N.Y., 1921, trans. E. Bruncken

[2] A. N. Whitehead: *Science and the Modern World*, p 229.

rank, or income.[1] To the traffic superintendent of a railway mankind is distinguishable according to its transportation needs, and the ability to convert those needs into effective demand. He cares no more for individual variations in the colour of passengers' eyes, or for their moral, social, æsthetic, or political differences, than does an insurance actuary for individual variations among the members of a particular age-group the expectation of life of which he is calculating. The research chemist, the geologist, the civil engineer, and nearly all other specialists are similarly engaged in observing and selecting facts significant to their work, abstracting them from their context and grouping them in ways likely to be useful. The sensational journalist on a London evening paper, who headed an account of an unseemly quarrel, "Old Etonian thrashes Vicar",[2] had a mind which might have been trained to more scientific work; and the porter who is said to have told the old lady that "cats is dogs, and rabbits is dogs, mum, but this 'ere tortoise is a hinsect" was unconsciously feeling his way towards methods of classification which underlie, not only law and science, but all systematic thought.

Scientific method, in the opinion of Professor Karl Pearson, actually consists in the careful and often laborious classification of facts, in the comparison of their relationship and sequences, and of

[1] A. L. Bowley: *The Measurement of Social Phenomena*, pp 52-54.

[2] This was an actual example. It is interesting to contrast the sensationalism of the journalist's method of classification with the legal method. The former is the exact opposite of the latter, the newspaper stressing exactly those social distinctions which are ignored in legal theory

the discovery of a brief statement which will resume in a few words a wide range of facts.[1]

"Classification", writes Professor Wolf, "is a method of science, it is a way of knowing things. . . . The essence of classification consists in the fact that certain things are thought of as related in certain ways to one another."[2] In this way it differs from collection, for it denotes the association of kindred facts, the collection, not of all, but of relevant and selected facts.

The process of classification, which is one of the principal elements in the "artificial" reason of the law, has two or three great advantages. The attempt to see all things freshly and in detail rather than as types and generalities is exhausting, and among busy affairs practically out of the question.[3] But even apart from the necessities of action, we cannot think in terms of an indefinite multiplicity of detail; our evidence can acquire its proper importance only if it comes before us marshalled by general ideas.[4] Classification simplifies the circumstances relating to the controversy with which the judge has to deal, and reduces the issue to manageable proportions. It relieves the memory from what would otherwise be an intolerable burden by concentrating attention on certain vital aspects of the dispute. It objectifies the administration of justice by eliminating individual differences and insisting on class similarities. It makes for impartiality by securing that individuals

[1] Karl Pearson: *Grammar of Science* (3rd ed.), p. 77. Cf. J. Arthur Thomson: *Introduction to Science*, p 75.

[2] A. Wolf: *Essentials of Scientific Method*, pp. 30-31.

[3] Walter Lippmann: *Public Opinion*, pp. 88-89.

[4] A. N. Whitehead: *Science and the Modern World*, p. 232.

and phenomena shall be differentiated according to recognisable objective criteria, and not according to the promptings of the subjective desires of the adjudicator. It avoids the possibility of justice being administered according to "will" instead of "judgment", as Alexander Hamilton put it[1] by providing a series of known tests for the ascertainment of rights and duties.

THE EXCLUSION OF IMPONDERABLES

But there are certain disadvantages which must also be taken into account. The disadvantage of exclusive attention to any group of abstractions is that, by the nature of the case, you have abstracted from the remainder of things, and the whole is lost in one of its aspects.[2] The "artificial reason" of the law tends to become rigid, and the system of classification may easily acquire an inflexibility which results in the neglect of factors which, though not susceptible to an orderly method of arrangement, are nevertheless of great importance.[3]

The disadvantage of the legal method of classification is, briefly, that it excludes imponderables: it suffers, like other methods, from the defects of its merits. The more subtle and intangible factors, which depend upon subjective taste and individual feelings, must necessarily be excluded from the

[1] *The Federalist*, No. 78.

[2] A. N. Whitehead: *Science and the Modern World*, pp. 73, 246.

[3] A good example of the inflexibility of certain legal categories is given in the following passage from *Christina Alberta's Father*, by H. G. Wells:

"Legally, you're Preemby's daughter. Nothing can alter that. All the resemblances and coincidences in the world won't alter that."

"And all the law in the world won't alter the facts. And——" (p. 276)

administration of justice if the law is not to be brought into disrepute and ridicule. Yet these imponderables, although in the present state of knowledge they cannot be brought to the realm of consciousness and there be coherently explained and reduced to logical order, sometimes play an immensely valuable part in human affairs. A judge who is called upon to give or withhold consent to the marriage of a ward of court will enquire into the age, wealth, and social position of the intended spouse;[1] but he cannot, in making his decision, pay regard to the delicate and subtle questions of character, environment, upbringing and mutual compatibility on which the success of a marriage depends, and which a parent would consider.

Mr. Walter Lippmann has indicated in a fine passage the ultimate necessity in intimate human relations for an "individualised understanding". Those whom we love and admire most, he says, are the men and women whose consciousness is peopled thickly with persons rather than with types, who know us rather than the classification into which we might fit. "For even without phrasing it to ourselves, we feel intuitively that all classification is in relation to some purpose not necessarily our own; that between two human beings no association has final dignity in which each does not take the other as an end in himself."[2] The law has very definite purposes which are greater than, and frequently incompatible with, the purposes of any individual

[1] A. H. Simpson: *The Law of Infants* (3rd ed.), p. 275, and see the cases there cited.

[2] *Public Opinion*, pp. 88-89.

member of society ; and in so far as those purposes promote the general good this is the final justification for its classifying methods.

It is clear that imponderables must be excluded from legal reasoning if any known and predictable body of doctrine is to be built up. But it is also clear that only certain classes of questions can profitably be determined by that method of reasoning. Lord Alverstone, when Lord Chief Justice, was no doubt thinking of this when he refused to discuss the qualifications of a teacher from an educational point of view, because it was, he said, " not a matter which can properly be discussed in a court of law."[1] The educational fitness of a teacher could, no doubt, be investigated by legal methods so far as the more obvious qualifications are concerned, such as the holding of a degree, the length of teaching experience, and so forth, but an enquiry into the intangible qualities which go to make the born teacher would elude all attempt at capture by that method.

It is admittedly difficult to draw the line between the questions which can, and those which cannot, be adequately determined by means of the reasoning processes of the law ; but it is easy to recognise instances which lie beyond the frontier. It is just possible, for example, to imagine the trustees of the Chantrey Bequest endeavouring to decide by legal methods of reasoning which pictures painted by contemporary artists during the year were most meritorious and deserving of purchase. What would happen would be that the man who had been a member of the Royal Academy for the longest

[1] Crocker *v.* Plymouth Corporation (1906), 1 K.B., p. 494.

period of time, or who had exhibited the largest number of pictures in public art galleries, or who had made the largest income during the previous ten years, or who could be differentiated by some other method of external measurement, would be accounted the most distinguished artist, and his works would be purchased. It is utterly impossible to believe that the best pictures would be selected by that method.

For centuries it has been the duty of the Home Secretary to decide in every case of murder whether the sentence of the court should be carried out, or a recommendation made to the Sovereign for the exercise of the royal prerogative of mercy. In the case of most other offences the judge has power to mitigate the penalty to meet extenuating circumstances, but in regard to the most serious of all crimes the judge is obliged to accept a verdict of guilty from the jury and is bound to pronounce a capital sentence.[1] His duty in this respect is, it has often been said, a purely ministerial one. After appeal to the Court of Criminal Appeal it is left to the Secretary of State for Home Affairs to take into consideration any recommendation for mercy put forward by the jury or any other circumstances which mitigate the gravity of the crime.

The Home Secretary takes into account not only the life-history, motives, and mental condition of the prisoner, but also the state of popular feeling on the matter, and many other considerations. Lord Gladstone, when Home Secretary in 1907, endeavoured to describe the attitude adopted by himself and his predecessors in regard to the evalua-

[1] Halsbury: *Laws of England*, vol. ix. p 373.

tion of various imponderable elements in this connection in the following words:[1]

"It would be neither desirable nor possible to lay down hard and fast rules as to the exercise of the prerogative of mercy. Numerous considerations—the motive, the degree of meditation or deliberation, the amount of provocation, the state of mind of the prisoner, his physical condition, his character and antecedents, the recommendation or absence of recommendation from the jury, and many others—have to be taken into account in every case: and the decision depends on a full review of a complex combination of circumstances, and often on the careful balancing of conflicting considerations. As Sir William Harcourt said in the House of Commons, 'The exercise of the prerogative of mercy does not depend on principles of strict law or justice, still less does it depend on sentiment in any way. It is a question of policy and judgment in each case, and in my opinion a capital execution which in the circumstances creates horror and compassion for the culprit rather than a sense of indignation at his crime, is a great evil.' There are, it is true, important principles which I and my advisers have constantly to bear in mind; but an attempt to reduce these principles to formulæ and to exclude all considerations which are incapable of being formulated in precise terms, would not, I believe, aid any Home Secretary in the difficult questions which he has to decide."

Although the legal methods of classification eliminate to a large extent the imponderable elements

[1] Parliamentary Debates, vol. 172, April 11, 1907, p. 366. Quoted by Sir E. Troup: *The Home Office*, pp. 62-63.

from the case, and the "artificial reason" which is based on those methods tends in the same direction, the mental processes of the judge are nevertheless at certain points often influenced to a considerable degree by the imponderabilia. In order to appreciate the way in which this may occur it is necessary to observe the psychological process by which a judicial decision is arrived at.

An analysis which Mr. Graham Wallas has recently made of the whole process of constructive thought is very suggestive in this connection. He distinguishes four stages in the solution of a problem or in the life-history of a definite piece of intellectual achievement: Preparation, Incubation, Illumination and Verification.[1] It is during the third stage that the imponderable elements play the largest part.

It is possible to apply this analysis to the psychological processes involved in not a little of the more important kind of judicial work. A judge sits listening to the beginning of a case with an absolutely open mind; he reads the pleadings, hears counsel's main arguments, and settles down to follow the evidence. This we may regard as the stage of Preparation, which in the case of a scientist would be replaced by a general investigation of the problem "in all directions". Quite often there is no stage which can be identified as that of Incubation; but in a long or important case, or one in which the hearing is adjourned, the intervals between the hearings may be filled in, partly by subconscious mental events, and partly by a voluntary abstention from all thought concerning the case, which may

[1] Graham Wallas: *The Art of Thought*, ch. iv.

have an important and valuable effect in producing the best decision on the matter in issue. The habit of English judges of not infrequently allowing an interval to elapse between the close of a difficult case and the delivery of judgment may enable a like purpose to be served. A third stage, of Illumination, may occur if the judge, as undoubtedly happens on occasion, suddenly has a definite "feeling" about the case, an intuitive flash, an unformulated suspicion of weakness regarding one of the parties which cannot at the moment be specified, an impression that something significant is being overlooked or passed over lightly, a feeling of mental discomfort at the persuasive and apparently flawless argument which counsel is putting forward in his address. This corresponds to the intimation which may come to a scientist who is on the verge of a hypothesis, or to the worker in any field of systematic thought. The fourth and last stage is the Verification of the hypothesis which has been suggested in the preceding stage.[1] In the case of judicial work, the verification may consist of listening to further evidence, or recalling past witnesses, or a closer scrutiny of their recorded testimony, or of a careful examination of the legal arguments adduced by both sides and of the results which would follow from their adoption, and an investigation of the authorities cited.

The process of Illumination is by far the most vital from the point of view of providing an opportunity for the imponderable elements in the case to play a part in applying the available categories,

[1] For an interesting example of the process at work, see Ronne *v.* Ronne, *Times*, April 25, 1927

and employing the "artificial reason" of the law, in the most advantageous manner possible. But it is precisely this intuitive process which is most incalculable and least subject to conscious control. It is, therefore, of the highest importance that its irrational nature should be appreciated, and the necessity recognised for the subsequent verification, in the most careful manner, of provisional "solutions" which have been intuitively suggested. All we can say on this question, in the present state of knowledge, is that the best judges in all civilised countries appear to be those who possess (in addition to a mastery of the law) an unusually wide range of natural intellectual power and emotional understanding; an extensive and normal experience of the world; and habits of thinking which modern psychology has shown to be successful, and of which they are themselves aware.

There are, however, certain departments of public affairs where it is desirable that those who have to perform judicial functions should be more free than any judge in a court of law can properly be, to give weight to the testimony of imponderable elements in human nature which are unrecognised by the "artificial reason" of the law, and unknown to its categories.

It is here that Administrative Tribunals, with their greater flexibility and freedom from the ancient categories of the law, may be of the greatest service to the community. Mr. Justice Holmes, of the Supreme Federal Court of the United States, speaking of the rulings of an Administrative Tribunal, said, "They express an intuition of experience which outruns analysis and sums up many

unnamed and tangled impressions—impressions which may lie beneath consciousness without losing their worth ".[1]

It is in periods of rapid change, when the existing categories of the law seem no longer to be meeting social needs which have not yet crystallised into the definite form which they must assume before they can find expression in the general body of the law, that Administrative Tribunals have usually made their appearance: in Tudor England, in post-Revolution France, in twentieth-century America, in England during the past twenty or thirty years. And it is in such periods as these that the freedom to consider imponderables, which is possessed by Administrative Tribunals, may be most valuable.[2]

JUDICIAL DISCRETION

We have seen that the methods of thought peculiar to the law tend to impose upon the judge the necessity of dealing with a case within the confines of a series of well-defined categories. But it does not follow from this that the judge is not left with a large discretion as to the manner in which the case shall be decided within the boundaries thus marked out.

In some parts of the law, it is true, the judge is more closely bound to follow a particular course, once certain facts have been established, than in others. Where rigid rules of law prevail, a legal situation may admit of but a single solution—a mere application of the appropriate rule. This type of case, in which the judge is only called upon to

[1] Chicago, B. and Q. Railway Co. *v.* Babcock (1907), 204 U.S., p. 585.

[2] Ernst Freund: "The Substitution of Rule for Discretion in Public Law", *American Political Science Review*, No. 4, p. 676.

apply an automatic rule, brings into play what is sometimes referred to as the subsuming function. We shall not here devote much attention to this type of activity, since there the judicial mind is seen at its lowest ebb.

What is of greater interest from the present point of view is the exercise of the judicial function in those far more important fields where a large discretion is left to the judge to use as he thinks fit.

" Discretion ", it was said in an old case, " is a science or understanding to discern between falsity or truth, between right and wrong, between shadow and substance, between equity and colourable glosses and pretences, not to do according to the will and private affections ".[1] It must be exercised, said Lord Halsbury some centuries later, in accordance with " the rules of reason and justice, not according to private opinion ; according to law, and not humour. It is to be, not arbitrary, vague, and fanciful, but legal and regular." [2] The King's Bench has power to redress things that are done otherwise, notwithstanding that they are left to the discretion of those that do them.

The idea of a discretion which is to be exercised, not in a capricious and impetuous way, but in a disciplined and responsible manner, is a conception which has had a wide application in English law and politics. It really represents a compromise between the idea that people who possess power should be trusted with a free hand, and not tied

[1] Rooke's case (40 Eliz.), 5 Co. Rep., p. 99 (*b*); Keighley's case (7 Jac. I.), 10 Co. Rep , p. 139 (*a*).

[2] Jacob (Tomlin's) Law Dictionary, London (1809), *v.* Discretion; 1 Lit. Abr., p. 477 ; Sharp *v.* Wakefield (1891), A C., p. 173 ; Cassel *v.* Inglis (1916), 2 Ch., p. 211.

down by narrow formulæ, and the competing notion that some contingent control must be retained over them in case they act in an unreasonable way. Discretion in public affairs is seldom absolute; it is usually qualified. It must be used "judiciously", and hence we often hear the expression "a judicial discretion".

The judge, says Judge Cardozo, "is to exercise a discretion informed by tradition, methodised by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life'".[1] In order to see what this means we cannot do better than to go outside the realm of formal proceedings in court and examine the administration of local government.

Ever since the time when the justices of the peace were in their heyday, the authorities concerned in the local government of the country have been regarded as possessing a discretion which had to be exercised in a strictly judicial way. Although the justices had important administrative duties and could appoint parish officers, allow their accounts, authorise rates, direct the mending of founderous roads, order relief to a destitute person, command a father to pay weekly sums for the maintenance of a bastard, apprentice a poor child, or remove a pauper to his place of settlement, they were, Mr. and Mrs. Webb point out, always justices controlled by a court of law rather than prefects controlled by a bureau, and even their executive duties had to be done "with judicial forms and in a judicial spirit".[2] A similarly qualified discretion has been applied

[1] B. J. Cardozo: *The Nature of the Judicial Process*, p. 141.

[2] Sidney and Beatrice Webb: *English Local Government—The Parish and the County*, p. 309.

to the modern local authorities which have superseded the justices in their administrative capacity.

The first condition imposed on the exercise of discretion is that the possessor of it must put his mind to the case and really use judgment in coming to a decision. He must not, that is to say, approach the matter with his mind already made up. He must not share the outlook of a certain Income Tax Commissioner, who, when an appellant came before him seeking relief from liability to tax, asked him whether he had already seen the local surveyor of taxes, adding " If you have, and cannot convince him, I am afraid there is little likelihood of your convincing us ".[1] It is a desire to avoid this sort of prejudice that underlies the principle that if the jury do not " honestly and judicially " approach the question before them, a new trial may be ordered.[2] The case in hand must be looked at on its merits, and not be determined without investigation by the light of some preconceived opinion on the subject. Thus, it is not a " judicial exercise of their discretion " for licensing justices to pass a general resolution to refuse licensing certificates ;[3] nor were the London County Council permitted to pass a resolution to the effect that no more permits to sell literature in the London parks should be granted, and then refuse an application made by a particular person for a permit to sell pamphlets.[4] The court held that it was an improper exercise of

[1] W. B Cowcher: " Direct Taxation from an Administrative Point of View ", *Journal of Public Administration*, July 1925, p. 262.

[2] Halsbury : *Laws of England*, vol xviii. p. 255.

[3] R. *v.* Sylvester (1862), 31 L.J. (M.C.), p. 93.

[4] R. *v.* L.C.C. (1918), 1 K.B., p. 68. Cf. R. *v.* Port of London Authority (1919), 1 K.B., at p. 184.

their discretion for the council to pass a general resolution not to grant permission and then to act automatically on that resolution. A judicial discretion requires that the question shall not be a *chose jugée*, but shall be approached with an open mind.

The second limitation which judicial discretion imposes is that the holder of it must honestly endeavour to further the purposes for which power has been given him, and must not seek to promote ends of his own, however benevolent or deserving of praise they may be.

There are many illustrations of this principle. Thus, overseers who were required by statute to certify whether applicants for liquor licences were residents and ratepayers of the parish were held not entitled to refuse certificates on the ground that in their opinion there were already too many public-houses in the neighbourhood.[1]

Licensing justices, it was said in the House of Lords, must use their discretion to carry out the purposes of the law, and must not by administrative evasion attempt to repeal the law which permits public-houses to exist. In another case, justices who were given power by statute to issue a distress warrant for non-payment of the Poor Rate, were not permitted to refuse to issue it on the ground that "the Act of Parliament was unjust". The justices, said Cockburn, C.J., "had no business to enter into that consideration at all".[2]

Lord Moulton, again, in the Arlidge case, observed that the Ministry of Health was bound to

[1] Sharp *v.* Wakefield (1891), A.C., p. 173, Halsbury, L.C., at p. 181.
[2] R. *v.* Boleter (1864), 33 L.J. (M.C.), p. 101.

avail itself of its wide powers under the Housing Acts solely for the purpose of carrying into effect in the best way the provisions of the Acts.[1] Maitland had in mind this idea that the adjudicator may not seek to use his power to further purposes of his own, when he said, concerning the justice of the peace, that "even if a discretionary power was allowed him, it was none the less to be exercised with 'a judicial discretion'; it was not expected of him that he should have any 'policy'; rather it was expected of him that he should not have any 'policy'".[2] Administrators, like judges, must have a policy whether they desire it or not, but the judicial process requires that the policy shall not be one for which no legal authority can be shown.

The third limitation imposed on the freedom of a person who is called upon to exercise discretion is that his motives must be straightforward and honest, and his conduct not influenced by extraneous matters. If it can be shown that a decision which is otherwise sound is based on motives which are not "judicial", or on considerations which are not valid in law, it will be set aside as an improper exercise of discretion.

The recorded cases present many examples of this. The Judicial Committee of the Privy Council decided, in an Australian appeal, that the municipal council of a city which is authorised to take land compulsorily for specified purposes will not be permitted to acquire it for different purposes, and its activities in this direction will be curtailed where

[1] Local Government Board *v.* Arlidge (1915), A C., at p. 147.

[2] F. W Maitland: "The Shallows and Silences of Real Life", *Collected Papers*, vol. i. p. 478.

it is shown that the council, though professing to exercise its powers for the statutory purpose, were in reality employing them to further some ulterior object.[1] In another case it was decided that a city corporation could not refuse to sanction building plans which complied with the regulations, on the ground that the houses planned were unsuitable to the locality and would depreciate the character of the neighbourhood.[2] In another case the Corporation of Brighton were shown to have been influenced, in refusing charabanc licences to a road transport company, by the fact that the company was defying the wishes of the corporation by running motor omnibuses into the city, and setting down passengers there in the narrow streets. Held: that the corporation had considered an extraneous matter which had probably influenced their decision, and it must therefore be quashed.[3]

In these limitations which are imposed on the exercise of discretion, in this gradual evolution of the idea of a discretionary power which is qualified rather than absolute, we can see an attempt to eliminate, from the action of the determining authority, caprice on the one hand and prejudice on the other. The mind of the authority is not to enjoy an unlimited freedom to decide howsoever it thinks fit, nor is it to be bound in advance to decide in a particular fashion. There is to be an element of balance in the decision which in some way we associate inevitably with the judicial spirit. The

[1] Municipal Council of Sydney *v.* Campbell (1925), A.C., p. 338, Mr. Justice Duff.

[2] R. *v.* Newcastle-on-Tyne Corporation (1889), 60 L.T. (N.S.), p. 963.

[3] R. *v.* Brighton Corporation (1916), 14 L.G.R., p. 776; see also R. *v.* Farnborough Urban District Council (1920), 1 K.B., p. 234; R *v.* Bowman (1898), 1 Q.B., p. 663.

early stages of law, though not the earliest,[1] witness the substitution of a rule for the caprice of an autocrat. Later, it is seen that it is better to give a wide discretion to the judge in substitution for a rigid formula. A further development occurs when this judicial discretion, with its freedom and its limitations, is extended to public authorities other than judges in courts of law. Within certain limits, the individual who exercises discretion is quite free: but if he venture outside those frontiers his power ends; if he takes into consideration matters "fantastic and foreign to the subject-matter", if he decide the matter according to "the will and private affections", then he is regarded as having failed to exercise any discretion at all.[2]

The idea of a qualified, or judicial, discretion, is not applied to public affairs only. There is a "judicial" element present in the obligation to transact certain private matters in a reasonable manner. Permissions which must not be withheld unreasonably, contracts which must be carried out reasonably, restrictive covenants which must not go beyond what is reasonably necessary, all imply a discretional limit which must not be overstepped.[3]

We think that the obligation to exhibit a judicial discretion could with advantage be imposed on Administrative and Domestic Tribunals. Administrative Tribunals came to be set up mainly because the ordinary processes of the law were too circumscribed to achieve certain ends, and because the methods of the courts of law were found to be too

[1] Cf. L. T. Hobhouse: *Morals in Evolution*, chapter on "Law and Justice."

[2] R. *v.* Local Government Board (1918), 2 I R., p. 131.

[3] Houlder Brothers *v.* Gibbs (1925), 1 Ch., p. 575.

slow and expensive. But although it may be desirable for certain purposes to have tribunals which are not bound by an inexorable body of law, and which can consider new social needs, it does not follow necessarily that such bodies should be entirely uncontrolled. In our desire to promote social ends which at present obtain little support in the courts of law, we must be careful not to go to the other extreme and abolish all the formal checks on capricious impulse and emotional disturbance, on the exercise of power according to "will" instead of "judgment", which in the last resort it is the function of the law to safeguard. We must not rely too exclusively on the inherent benevolence and incorruptibility of mankind, nor put too great a strain on human nature by according absolute freedoms lightly, else we may find the tyrant in our midst once more.

What is needed at the present time is that the administrative and other tribunals whose decisions at present enjoy an absolute immunity from review by the courts (assuming that certain superficial and elementary procedural requirements are complied with) should be required to display a judicial discretion in making those decisions. Where it can be shown that they have not come to the question in dispute with an open mind, ready to investigate it on its merits; where they do not use their power with the intention of honestly endeavouring to further the purposes for which it has been given to them; where the motives which prompt the decision can be proved to be neither honest nor straightforward; where the tribunal has been influenced by extraneous considerations; then in any of these

circumstances the conclusions of the tribunal should be open to review, and if necessary set aside. We cannot endow all men with the judicial mind ; but we can at least prevent them from behaving in a manner which make sound judgment impossible. We cannot define the path along which every tribunal which has to determine complex social questions must walk, but we can keep them from turning in certain directions which are known to lead away from the promised land of justice.

THE GOOD JUDGE

The judge, as we have seen, must exercise his functions in a way which fulfils the need for consistency, for equality, and for certainty. His administration must be objective and impartial, and he must state explicitly the reasons for his decisions. He must suppress his personal emotions and instinctive prejudices and encourage his sense of fairness. He must do right to all manner of men " without fear or favour, affection or ill-will ". He must not be of that company of whom Valentine cries, in *The Two Gentlemen of Verona* : " These are my mates, that make their wills the law." He must come to the case with an open mind. Alertness, flexibility, curiosity must be the friends of his mind ; caprice, rigidity and prejudice its enemies.[1] He must be able to suspend judgment until he has systematically surveyed the circumstances of the case.

But the possession of those qualities does not mean that the judge is to be a mere logical machine, an intellectual abstraction. " Deep below con-

[1] See *ante*, pp. 220-228.

sciousness", writes Judge Cardozo, "are other forces, the likes and dislikes, the predilections and the prejudices. The complex of instincts and emotions and habits and convictions, which make a man, whether he be litigant or judge." There has been, he adds, a certain lack of candour in the discussion of this theme, or rather in the refusal to discuss it, as though judges must lose respect and confidence by the reminder that they are subject to human limitations. "None the less . . . they do not stand aloof on these chill and distant heights; and we shall not help the cause of truth by acting and speaking as if they do." [1]

It is necessary to touch on this subject in order to disperse a legendary conception of judicial impartiality which commonly prevails. The administration of justice requires just as much prejudice on the part of the judge in one sense as in another sense it requires an absence of prejudice. Society demands that its judges shall be biased in certain directions no less insistently than it demands that they shall be unbiased in others. Ethical considerations cannot be excluded from the administration of justice any more than from any other department of government.[2]

The very fabric of English law bears witness to the truth of this assertion. Take as a single instance the formative influence of public policy, or the policy of the law, as it is sometimes called, on the body of legal doctrine existing at any given time. Public policy can be found entering into every department of English law; and in many branches

[1] B. J. Cardozo: *The Nature of the Judicial Process*, p. 167.
[2] Dillon: *Laws and Jurisprudence of England and America*, p. 18.

it has had a decisive influence. We see it as a prevailing element in judgments relating to agreements in restraint of trade,[1] validity of contracts,[2] misrepresentation and fraud,[3] the foundation of charities,[4] partnerships,[5] wills,[6] marital relations,[7] criminal offences,[8] trusts,[9] policies of assurance, wagering, and a vast number of other matters. Wherever we look we see it running like a red thread through the carpet of the law. It is public policy which makes void a deed providing for future illegitimate children ;[10] it is public policy which prohibits public officers from assigning their salaries ;[11] it is public policy which prevents the enforcement of promises made in consideration of sexual immorality;[12]

[1] J. B. Matthews and H. M. Adler: *Restraint of Trade*; W. H. Moller: *Voluntary Covenants in Restraint of Trade*. Cf. Nordenfeldt *v.* Maxim-Nordenfeldt Gun Co. (1894), A.C., p. 535; Attwood *v.* Lamont (1920), 3 K.B., p. 571; Moris *v.* Saxelby (1916), 1 A C., p. 688; Hepworth *v.* Ryott (1920), 1 Ch., p. 1; N.W. Salt Co. (1914), A.C., p. 461.

[2] Sir W. Anson: *Law of Contract* (14th ed.), p. 239 ff.

[3] Begbie *v.* Phosphate Sewage Co (1875), L.R., 19 Q.B , p. 499; Post *v.* Marsh (1880), 16 Ch.D., p. 395; Bile Bean Manufacturing Co. *v.* Davidson (1906), 8 F. (Court of Sess), p. 1181; Slingsby *v.* Bradford (1906), W.N., 51 C.A.

[4] Walsh *v.* Gladstone (1842), 13 Sim, p. 261; De Windt (1854), 2 Eq. Rep., p. 1107, Bourne *v.* Keane (1919), A.C , p. 815.

[5] Sterry *v.* Clifton (1850), 9 C B , p 110; Jeffrey *v.* Bamford (1921), 2 K B , p 35; O'Connor *v* Ralson (1920), 3 K.B., p. 451.

[6] *Re* Beard, etc. (1908), 1 Ch , p 383; *re* Morgan (1910), 26 T L.R., p. 398; *re* Sandbrook (1912), 2 Ch , p. 471.

[7] Halsbury: *Laws of England*, vol. xvi. pp. 439-440; Anson, *op. cit.* p. 247; Hermann *v.* Charlesworth (1905), 2 K.B., p. 123; Lowe *v.* Peers (1768), 4 Burr, p 2225; Hartley *v* Rice (1808), 10 East, p. 22.

[8] Consolidated Exploration Co. *v.* Musgrave (1900), 1 Ch , p. 37; R. *v.* Porter (1910), 1 K.B., p. 369; Dann *v.* Curzon (1910), 27 T.L.R., p. 163.

[9] Thompson *v.* Thomas (1891), 27 L.R.Ir., p. 457; Morley *v.* Rennoldson (1895), 1 Ch., p. 449; Phillips *v.* Probyn (1899), 1 Ch., p. 811.

[10] Thompson *v.* Thomas (1891), 27 L.R.Ir , p. 457.

[11] Wells *v.* Foster (1841), 8 M. and W., p. 151.

[12] Anson on Contracts (14th ed.), p. 243; Gray *v.* Matthias (1800), 5 Ves., p. 285 (*a*); Beaumont *v.* Reeve (1846), 8 Q.B., p. 483.

it is public policy which sets aside charitable gifts intended for the use of a Franciscan convent, for the education and maintenance of Dominican priests, for the payment of fines by imprisoned criminals, for the promotion of atheism, for the ecclesiastical supremacy of the Pope,[1] and for a host of other objects. It is impossible here even to outline the full scope of public policy as a law-moulding agency, initiated and developed entirely by judges of the superior courts; but enough has been said to indicate its importance. Yet public policy is nothing more or less than the expression of certain social sympathies and antagonisms of the judges, certain ethical ideals, which have taken definite form in particular decisions, and in that way become crystallised into stable doctrines.

Nor is the influence of ethical considerations formulated by the judge a thing of the past. In England the courts cannot stereotype national policy, or the policy of the law, it was said by a law lord in one leading case. Their function is not merely to accept the rule of policy laid down a century ago, but also to ascertain what is the rule of policy for the present time; and it then becomes their duty to refuse to give effect to transactions which violate that policy, since to do so would prove injurious to the community.[2]

What is to be regarded as injurious to the community is, however, a matter which depends on the ethical and social outlook of the judges who happen

[1] Walsh *v.* Walsh (1869), I.R., 4 Eq., p. 396; Bowman *v.* Secular Society (1917), A.C., p. 406; Macduff (1896), 2 Ch., p. 451, at 474. And see Halsbury: *Laws of England*, vol. iv. p. 123, and the cases cited therein.

[2] Nordenfeldt *v.* Maxim-Nordenfeldt Gun Co. (1894), A.C., p. 535, Lord Watson at p. 553.

to be on the bench at a particular moment. There is no copyright in a book which, in the view of the court, is unfit for sale on the ground of immorality, blasphemy or sedition.[1] A century ago the Court of Chancery refused to grant protection against piracy to Byron's *Don Juan*, because of its " marked disrespect towards the morals, the religion, and the political institutions of England." [2] To-day, *Don Juan* is an accepted classic, disrespect and all ; but copyright is denied on similar grounds to a book by Mrs. Elinor Glyn, called *Three Weeks*, a novel which, a learned judge remarked, " apart from its other objectionable features, advocates free love and justifies adultery where the marriage tie has become merely irksome ",[3] and which, stripped of its trappings, appeared to him as " nothing more or less than a sensuous adulterous intrigue." [4] *Three Weeks*, unlike *Don Juan*, is never likely to become a classic, or even a remembered literary work ; but that is beside the point, since all that we are endeavouring to demonstrate is that the judicial process is a function in which the ethical and social prejudices of the judge play a large part.

In all civilised countries the judge must, in fact, possess certain conceptions of what is socially desirable, or at least acceptable, and his decisions, when occasion arises, must be guided by those conceptions. In this sense judges are and must be biased.

There is nothing startling, or even disrespectful,

[1] Halsbury : *Laws of England*, vol. viii. pp. 144, 191.

[2] Lord Byron *v.* Dugdale (1823), 25 Revised Reports, p. 282 ; 1 L.J., Ch., pp. 239-240.

[3] Glyn *v.* Weston Feature Film Co (1916), 1 Ch., p. 261.

[4] *Ibid.*

in this assertion. It is a simple fact that a man who had not a standard of moral values which approximated broadly to the accepted opinions of the day, who had no beliefs as to what is harmful to society, and what beneficial, who had no bias in favour of marriage as against promiscuous sexual relations, honesty as against deceit, truthfulness as against lying ; who did not think wealth better than poverty, orthodox religion preferable to atheism, courage better than cowardice, constitutional government more desirable than anarchy, would not be tolerated as a judge on the bench of any Western country. Yet fornication, atheism, cowardice, lying and many forms of deceit are permitted under the law of England.

Everyone who has to use his discretion in connection with social affairs must in the last resort exercise it in accordance with preconceived ideas of what is desirable, be he administrator or judge or legislator. In this sense judges are, and must be, biased. A background of social prejudice is as necessary for judges as it is for the rest of us, and cannot be dispensed with in the discharge of their daily work. It would be almost impossible to run the judicial system if judges had an absolutely open mind on every question under the sun, and had no bias in favour of goods recognised as such by the majority of their fellow-countrymen.

The holders of judicial office are, in fact, in the end, like all public functionaries, charged with the responsibility of choosing, but of choosing well.[1] " The cold neutrality of an impartial judge " of

[1] Learned Hand : " The Speech of Justice ", *Harvard Law Review*, xxix. p. 621.

which Burke [1] speaks is neither an accomplished fact nor a desirable ideal, and no useful purpose is served by discussion which implies that at a certain point in a man's career he suddenly loses all the normal attributes of human nature. A more enlightened appreciation of the service to the public which is rendered by a judge who adorns his office, and of the difficulties with which he is confronted, would start by contrasting the effort of mind which is demanded of him in order to overcome his natural prejudices, with the lazy refusal to make a similar effort which is manifested by the greater part of mankind in the ordinary affairs of the market-place and the forum and the domestic hearth and the political meeting. Except when we deliberately keep prejudice in suspense, Mr. Walter Lippmann reminds us, we do not study a man and judge him to be bad. We see a bad man. We see a dewy morn, a blushing maiden, a sainted priest, a humourless Englishman, a dangerous Red, a care-free Bohemian, a lazy Hindu, a wily Oriental, a dreaming Slav, a volatile Irishman, a greedy Jew, a 100 per cent American. In the workaday world that is often the real judgment, long in advance of the evidence, and it contains within itself the conclusion which the evidence is pretty certain to confirm. Neither justice, nor mercy, nor truth enter into such a judgment, for the judgment has preceded the evidence.[2]

Even from the point of view of the judge himself, the "cold neutrality" legend is definitely unhelpful. It has been widely observed that the judge

[1] Burke: "Preface to Brissot's Address", *Works*, vol. 5, p. 67.
[2] Walter Lippmann: *Public Opinion*, pp. 119-120.

who realises before listening to a case that all men are biased is more likely to make a conscientious effort at impartiality than one who believes that elevation to the bench makes him at once an organ of infallible logical truth.[1]

What is meant by the impartiality of judges, so far as social matters are concerned, is that they shall not permit their opinions on certain controversial subjects of the day to influence their judgment. The judicial mind is not to be deflected by the passions of the moment on social, economic, political or religious questions. Nor is it enough for the judge merely to endeavour to discover and follow the deeper and more permanent loyalties of the community. He must also seek to promote the progressive evolution of society, to manifest what Judge Learned Hand calls "the half-framed purposes of his time."[2] The "good" decision is not the one which necessarily satisfies public opinion to-day, but that which will also be felt to be right five or fifteen years hence. Just as the good judge of art or literature is the man who can discern those qualities in a picture or a book which will stand the test of time, so the good judge in a court of law or other tribunal is the one who can use his discretion in a way which will assist the evolving tendencies of the community. Stress is always laid on the duty of a judge to be a trustee of the past; but in reality it is far more important that he should be a prophet of the future, in so far as that is compatible with the faithful administration of the existing body of law.

[1] Lord Justice Scrutton: "The Work of the Commercial Courts", *Cambridge Law Journal*, 1923, at p 8.

[2] Learned Hand: "The Speech of Justice", *Harvard Law Review*, xxix. pp. 617-618.

The administration of justice in a modern community requires, we suggest, not only a real desire on the part of the judge to promote the general welfare of the community, but also a judicial outlook in regard to social matters which is neither static nor rooted in the past. " My duty as a judge ", says Judge Cardozo, " may be to objectify in law, not my own aspirations and convictions and philosophies, but the aspirations and convictions and philosophies of men and women of my time. Hardly shall I do this well if my own sympathies and beliefs and passionate devotions are with a time that is past." [1] It is when judicial functions are exercised with scant regard for the evolution of society that judicial institutions are called into question. It is when the attainment of the " good to be " is obstructed by the preservation of the " good that is ", that the plain man becomes distrustful of the judicial process ; it is when the courts of law fail to reflect the progressive tendencies of the time, and to promote the social aspirations of to-day as well as those of yesterday, that Administrative Tribunals are called into existence in the belief that they, at least, will respond more exactly to present needs.

But Administrative and Domestic Tribunals often themselves display an incapacity for promoting the social development of the community no less marked than that shown by such formal courts as that presided over recently by Judge Raulston at the trial of Mr. Scopes, in Dayton, Tennessee, on the charge of teaching the Darwinian theory of Evolution in a State school. The General Medical

[1] B. J. Cardozo : *The Nature of the Judicial Process*, p. 173.

Council, which, as we noted in a previous chapter,[1] performs important judicial functions in hearing cases where " infamous conduct in any professional respect " is alleged against a medical practitioner, has of late years been severely criticised as a judicial body on grounds which at bottom amount to the allegation that the professional instincts of the members of the Council prevent them from exercising their powers in a manner which is consonant with the newer ideals and discoveries of the medical world, and the changing needs of the general public. The President of the Council, Sir Donald MacAlister, in his opening address at the 123rd session of the Council,[2] appeared totally unable to comprehend the nature of this criticism. The Council, he said, is always ready to entertain requests for restoration to the Medical Register by practitioners whose names have been removed. It has provided a regular procedure which is " uniform for all that it may be just for all " ; and this procedure, he added later, has often been " vindicated " by the High Court of Justice. The Council would, he continued, always exercise its judicial functions " without fear or favour, affection or ill-will ". Its stability as a judicial body was not to be swayed from an even course by partisan abuse or threat. Criticism of the composition of the tribunal, which the President described as an " attempt to influence the Council's judgment by threatenings against its constitution if it did not yield to interested or ignorant demands ", he likened to " the lawless attempt on a larger scale against the national constitution itself ",

[1] See p. 172.
[2] *Times*, June 2, 1926.

which he asserted to be the object of the General Strike of 1926.

The President of the General Medical Council seemed totally unable to grasp the fact that the procedure of a judicial tribunal may be unimpeachable, its stability unquestioned, and its business conducted without personal favouritism, and yet that the authority of the tribunal may nevertheless be challenged, and the sense of what justice requires be left unsatisfied, if the outlook of the judges is rooted in the past; if, from professional instinct, or any other reason, they are unable to display an allegiance to the future, and unwilling to make allowance for the aspirations which others may have conceived. An ability to hold the scales evenly, not only between man and man, but between the claims of the past and the claims of the future, is one of the qualities which goes to the making of the true judicial mind.

CONCLUSION

We have attempted in this chapter to analyse the more important psychological elements which are involved in the judicial process, and which are often summed up in such phrases as "the judicial temper" or "the spirit of justice". Our analysis has been brief and inadequate, but in a work the primary object of which is to survey Administrative Tribunals and other judicial institutions outside the formal courts of law, it was essential that some mention, however insufficient, should be made of the logical and psychological factors which are involved in the judicial process. To have concentrated

exclusively on the formal or external attributes of judicial administration would resemble a performance of *Hamlet* without the Prince of Denmark.

We can now pass on to a discussion of the advantages and disadvantages possessed by these Administrative Tribunals, and endeavour to evaluate the body of administrative law which has sprung up in England during the past half-century. We shall also endeavour to make some constructive proposals which may prove of practical use in the future.

CHAPTER VI

TRIAL BY WHITEHALL: AN EVALUATION

The Revival of Administrative Law—The Causes of its Growth—The Advantages of Administrative Tribunals—The Disadvantages of Administrative Tribunals—The Bogey of Political Interference—The Structure of Administrative Tribunals—The Dangers of Administrative Law—The Regulation of Administrative Tribunals—The Control of Domestic Tribunals—Some Constructive Proposals—Conclusion.

THE REVIVAL OF ADMINISTRATIVE LAW

IN the preceding chapters we have examined the chief characteristics of the judicial function, both from the institutional and the psychological points of view. We saw that administrative and judicial functions were in early times inextricably blended in undifferentiated organs of governmental authority, and that it was only at a comparatively late date that the courts of law which now constitute the formal judiciary gradually split off from the general executive organs and evolved along distinct lines of their own.

The separation of judicature from administration has at no time been complete, but during the past half-century, and particularly during the last fifteen years or so, a mass of judicial functions has been entrusted by social legislation to the central departments of government or to Administrative Tribunals connected directly or indirectly therewith.

In this way a new body of administrative law has been introduced into the British Constitution; for although it may be regarded from one point of view as a revival, in the sense that administrative law has existed in previous periods of English history, the form and circumstances in which it appears to-day are so peculiar to our own time that the whole movement must really be regarded as a new development.

We have already described at some length the judicial powers which have thus been allocated to Administrative Tribunals, and we have also mentioned, in order to complete the picture, those which are exercised by unofficial or voluntary bodies such as the executive organs of clubs, friendly societies, professional associations, trade unions, and similar groups fulfilling special functions and exercising jurisdiction over their members. In the following pages we shall endeavour to trace the causes which have led to the establishment of Administrative Tribunals, to assess the advantages and disadvantages of administrative justice as compared with justice in the Courts, and to suggest certain guiding principles that might usefully be followed in future developments in the same field.

THE CAUSES OF ITS GROWTH

There are many immediate causes for the growth of administrative law in England, but the underlying explanation is to be found in the vast extension of state and municipal activity which has taken place during the past fifty years. A mere glance at the subject-matter of the legislation which has

conferred judicial powers on Government departments is sufficient to demonstrate this. It is in the acts relating to Public Health, to Housing and Town Planning, to National Health Insurance, to Unemployment Insurance, to Education, to Old Age Pensions and pensions for Widows and Orphans that the main sources of administrative law are to be found—all of them extending the realm of public administration and regulation to spheres undreamed of by the *laissez-faire* individualists of the early and mid-Victorian era. In these and many other fields the social control of private enterprise, or the public administration of social services for the common good, has superseded the old unregulated individualism of the first three quarters of the nineteenth century, or the mere lack of provision for widespread social needs which accompanied it.

It was impossible for the executive to carry out these greatly enhanced and extended functions of government so long as its activities were limited by the old individualistic ideas which prevailed in an extreme form in the courts of law. The intense legalism of the English system of law is one of its most notable features, and one which results in a tendency to sacrifice the public welfare to private interests where the latter can lay claim to individual rights. "It displays", as a foreign observer has said, "an unlimited valuation of individual liberty and respect for individual property".[1] It is concerned less with social righteousness than with individual rights. It tries questions of the highest social import as mere private controversies between John Doe and Richard Roe, and is so zealous to

[1] Quoted by Roscoe Pound: *The Spirit of the Common Law*, p. 13.

secure fair play to the individual that often it secures very little fair play to the public. Even our body of constitutional law is in the main concerned with the rights of the subject rather than with the claims of the community, or the obligations of citizenship.

Some change in the administration of law was indubitably needed if the new world of social control was to be brought peacefully into existence. Social interests cannot be secured, or a social policy effected, by the application of abstract principles of justice as between man and man.

The development that actually occurred has been, we have seen, the creation of a large number of Administrative Tribunals which were, from the outset, unfettered by the existing legal tradition, and able to break away entirely from the prevailing body of legal doctrine based on private rights. If constitutional law emphasises individual rights, administrative law lays equal stress on public needs; that is, on the duties owed by a citizen to the public,[1] on the subordination of private interest to the common weal. In short, the tendency towards the socialisation of government has been accompanied by a parallel tendency towards the socialisation of law. The invasion of the Rule of Law by the placing of judicial functions in the hands of officials has been due to what Dicey called "the whole current of legislative opinion in favour of extending the sphere of the State's authority", which resulted in state and municipal officials having more and more public business to manage.[2]

[1] F. J. Goodnow: *Comparative Administrative Law*, vol. i. p. 8.
[2] A. V. Dicey: *Law of the Constitution* (8th ed.), Introduction, p. xxxix.

A similar development has taken place in a somewhat different form in the United States of America, where, as Dean Pound observes, until the establishment in recent times of administrative boards and commissions, " Law paralysed administration. In the nineteenth century injunctions, actions for trespass and mandamus proceedings hemmed in the executive officer on every side . . . the system of checks and balances produced a perfect balance. In practical result, the law too often accomplished little or nothing."[1]

It was a revolt from this condition, which had become intolerable in the complex circumstances of American city life at the end of the nineteenth century, that resulted, in the United States as in England, in the creation of a large number of Administrative Tribunals. In the Federal government alone there are, according to Mr. Hoover, more than two hundred separate bureaux, boards and commissions exercising administrative and judicial functions simultaneously;[2] and throughout the states there are to be found administrative courts dealing with controversies relating to public utility undertakings, trade practices, workmen's compensation, and industrial disputes.[3]

But although the underlying explanation of the rise of administrative justice in England, as in America, is to be found in the extension of the functions of government to one new sphere after another, and in the consequential need for a system of adjudication which would sanction and enforce

[1] Roscoe Pound: *The Spirit of the Common Law*, p 56.

[2] " Government by Guess ", *Nation*, New York, December 9, 1925.

[3] W. H. Pillsbury: " Administrative Tribunals ", 36 *Harvard Law Review*, p. 407.

the inevitable infringement of individual legal rights which that development made necessary, there has been right up to our own time no conscious recognition of this need as the real cause; and the supersession of the courts of law by Administrative Tribunals has been ascribed to practical requirements of various kinds. Not that the practical reasons were imaginary. The thread of social necessity has many strands; and there have been various practical reasons which have contributed to shift the centre of gravity away from a province wherein property and contract were the dominating forces to one in which the common weal was the paramount consideration. But they have been subsidiary.

Chief among these subsidiary causes has been the desire to provide a system of adjudication which should be at once cheap and rapid. The elaborate methods of investigation employed by the courts of law, the insistence on first-hand evidence, the obligation for witnesses to appear in person, the necessity for proving formally every document and fact relevant to the issue, the requirement that pleadings shall be formulated in technical language, the employment of highly trained counsel and solicitors, all these possess great advantages from many points of view, and are necessary for the maintenance and development of the "artificial reason" of the law, but they make the judicial process inevitably slow and expensive. A measure which aimed, like the Public Health Act of 1875, at compelling the whole nation to change its existing system of domestic sanitation, would never have been put into ubiquitous operation in less than a century if

its enforcement had depended on the costly and cumbersome methods of the law courts. The Health Insurance scheme would have been unworkable if every contested claim for benefit by an insured contributor had had to be decided in accordance with the ordinary machinery of the law.

Then, again, the mere volume of work involved by certain kinds of social legislation would have thrown an intolerable strain on the existing framework of the judicature. The Unemployment Insurance scheme alone gives rise every year to tens of thousands of separate cases in which claims for benefit are contested before the Courts of Referees, and the determination of these by the courts of law would have required a very large expansion of the judiciary. It would, moreover, have been quite outside the tenor of English tradition to have enlarged the judicial system merely to cope with a single measure. In the United States the pressure of work has had a similar influence in leading to the erection of Administrative Tribunals. An American writer, referring to the setting up of the General Land Office in Minnesota, observes that the only reason that can be found for the development of this special machinery to deal with public land controversies is " the impossibility of handling the volume of business that the land department had to handle by any court machinery. The amount of work done by the land department at the time of its greatest activity was so great that ' doing a land office business ' became proverbial." [1]

Even more important as a cause of the growth

[1] Henry L. McClintock: " Public Land Controversies ", *Minnesota Law Review*, vol. 9, No. 7, pp. 1055-1056.

of administrative law is the fact that in practically every field to which public administration has extended, new standards have had to be set up and maintained. The Housing Acts require that a house is to be "reasonably fit for human habitation", or the local authority may compel the owner to put it in repair;[1] the Health Insurance Act requires a standard of medical service and treatment for the insured population to which all doctors on the Health Insurance panel must conform, and which is quite different from the old standard established by the common law;[2] a standard of sanitation and housing and conditions of employment is required in order to penalise local authorities or employers or utility corporations which fall below it;[3] a standard of capacity for work and willingness to undertake and look for it are required in order that the object of the Unemployment Insurance scheme may not be frustrated;[4] standards of educational need are required before an appeal against a proposal to erect a new school can be properly determined, and standards of educational attainment before it can be decided whether local authorities are carrying out their duties in regard to non-provided schools, and in various other ways. When the Ministry of Health is the arbiter about charges for the cost of making up streets, or for closing of unfit houses, and so forth, said Dr. Gibbon, the official witness for the department, in

[1] Housing Act, 1925, 15 George V. c. 14, sec. 3.

[2] National Health Insurance Act, 1924, sec. 24. See also letter on Disciplinary Procedure in *British Medical Journal Supplement*, October 16, 1927, p. 173

[3] *Ibid.* sec. 107; but see *ante*, pp. 122-124.

[4] Unemployment Insurance Act, 1920, sec. 7; Unemployment Insurance (No. 2) Act, 1924.

giving evidence before a recent Royal Commission, "the real question is an administrative question. . . . The real matter at bottom is, what is the standard to which the road should be made up? Likewise with regard to the closing of houses, what is the standard which the house should reach?"[1]

The professional associations representing doctors taking health insurance work have failed to recognise the emergence of an entirely new standard of service, and the evolution of a change in the relationship between patient and practitioner. This failure made the evidence which those bodies gave before the Royal Commission on Health Insurance appear to be narrowly preoccupied with the interests of the profession, and oblivious of the wider social interests of the community. The witnesses on behalf of the British Medical Association solemnly asserted that the standards of treatment and attention required from practitioners who are annually receiving large capitation fees derived from State contributions and compulsory payments levied on workers and employers would be adequately assured by the right of the insured contributor to change his doctor if he were dissatisfied.[2] The Medical Practitioners' Union was unable to see why the Minister should claim to exact "a higher standard of treatment than is called for in the ordinary courts" in private practice cases; and regarded the Minister's attempt to penalise doctors for negligence or incompetence, especially in cases where no action for damages would lie under the old

[1] Royal Commission on Local Government, Minutes of Evidence, part i. Q. 1660, p. 66.

[2] Royal Commission on National Health Insurance, Appendix to Minutes of Evidence, part iii. p. 449, para 37.

common law tradition, as demonstrating not so much "deliberate illegality" on his part as "unfitness for the exercise of judicial functions".[1] Both bodies put forward proposals which would in effect have thrown the entire machinery for adjudicating upon complaints against doctors into the hands of the medical profession, with results which can easily be imagined.[2] The Minister of Health, however, stoutly resisted these and subsequent proposals. For both he and the Royal Commission concurred in holding it to be inconsistent with the fundamental principles of the Health Insurance scheme that questions regarding medical treatment arising between a panel doctor and an insured person should be "regarded as a purely private matter to be dealt with in precisely the same way as when they arise between a private practitioner and a private patient".[3]

The King's judges had for centuries laid down standards of honest conduct and straightforward dealing between man and man in regard to such matters as the sale of goods, the administration of a trust, the duty owed by a professional man to his client, the good faith required in making a policy of insurance, and so forth. But affairs of this kind, transactions of an essentially private nature, were far removed from the spheres of activity in which standards of conduct and achievement were now required, in the social interest, in order that national

[1] Royal Commission on National Health Insurance, Appendix to Minutes of Evidence, part iii. p. 473.

[2] In subsequent correspondence with the Minister of Health the British Medical Association suggested alternatively an appeal to the courts. See *British Medical Journal Supplement*, October 16, 1926, p. 173.

[3] *Ibid.*

minima of health, education, housing, sanitation, protection against loss of work, and so forth might be assured, and their observation required from the entire community.

The Royal Sanitary Commission of 1871, speaking of the control by the central department over the local boards of health and other authorities in sanitary matters, reported that the existing legal remedy of mandamus was not adequate. The process is long and dilatory, and the case, "when at last brought to issue, would be of a nature which a court of law is eminently unfitted to try. Details of sewers and sewage; quantity and quality of water supplied; character and volume of water within reach; capacity of works to be constructed, their nature and general arrangement; state of domestic offices; mode in which scavenging is done and removal of refuse carried on: these and similar questions would be the points for discussion, and the mere statement would appear to afford sufficient proof that they cannot with any satisfactory result become the subject of judicial decision".[1] The Commission recommended accordingly, after discussing alternative methods, that the central authority should have full power to make a conclusive order binding on the local authority and enforceable in the courts.[2]

For the task of hammering out new standards in fields such as these the courts of law would doubtless have been among the first to acknowledge their own manifest unsuitability.[3] Even where standards have been evolved by the courts, they have some-

[1] Royal Sanitary Commission, Second Report, 1871, c. 281, p 37.

[2] *Ibid.*

[3] Crocker *v.* Plymouth Corporation (1906), 1 K.B., p. 494. See p. 222 *ante.*

times shown a tendency to crystallise into rules; and much of the equitable jurisdiction of the Court of Chancery, which originally consisted of the discretionary application of moral standards, has hardened into doctrines which are in practice sometimes as inflexible as the most rigid rules of the common law.

Yet greater reliance upon standards and less reliance upon rules marks the transformation which is taking place in society, from a condition in which contract and property were of supreme importance, to one in which the administration of services in the public interest is of at least equal importance;[1] and one of the causes of the growth of administrative law, both in England and in the United States, has been the need for evolving new standards in untrodden fields of legal and administrative activity. The ordinary courts of law are more suitable for determining a dispute where each party claims something definite, than for deciding those in which a standard of service or attainment has to be determined and enforced in the public interest. For the setting up of standards of this kind often requires expert knowledge and special experience in a particular field. The question whether a local authority is justified in restricting traffic in excess of a certain weight from crossing a particular bridge[2] is an engineering problem: a right decision demands the application of rules which only engineers understand, and that capacity for sound judgment which is acquired

[1] Cf. Roscoe Pound: "The Administrative Application of Legal Standards", 44 *American Bar Association Reports*, p 446.

[2] Ministry of Transport Act, 1919, sec. 11; Locomotives Act, 1898, sec. 6; Locomotive Act, 1861, secs. 6 and 7.

only by long experience of similar problems. In other fields of social control the creation of standards requires a technical knowledge of education, medicine, sanitary engineering, thermo-dynamics, and other subjects which lie outside the ken of most lawyers. In America the need for tribunals capable of applying standards of conduct in specialised fields has led to the modern development of administrative law ; [1] and the same is true to no small extent of England.

But the creation of new standards in unexplored fields has demanded something more than mere technical knowledge. It has required, in the second place, an infusion of certain moral ideas which have hitherto exerted but a small influence on the course of litigation in the courts of law. Many of the judicial powers of the administrative departments of State refer to matters which are prosaic enough in all faith : drains and sewers, contaminated wells and polluted streams, cesspools and nuisances, gas and water. The significant fact is that the powers of adjudication are to be exercised not with the object of enforcing individual rights, but with the purpose of furthering a policy of social improvement, such as the promotion of the public health, the securing of better housing conditions, or the mitigation of distress from unemployment. Hence it is that new moral conceptions have been called for in the adjudication of disputes ; and it is this need which, almost unconsciously, has led to the formation of Administrative Tribunals. Periods of liberalisation of the law have always involved for a time a movement away from law, a temporary reversion

[1] Gerrard Henderson : *The Federal Trade Commission*, pp. 95-98.

to what has been called "justice without law", in which arbitrary power is looked upon complacently since it is taken to be the sole means of escape from the bonds imposed by strict law.[1] In America the infusion of new moral conceptions and of ideas developed in the social sciences has produced a tendency away from the ordinary courts which has proceeded much further than in England. It has led to the creation, not merely of Administrative Tribunals for handling special problems, such as the determination of "reasonable" rates and service from utility undertakings, the amount to be awarded for workmen's compensation, standards of fair trading, and so forth, but also of juvenile courts, domestic relations courts, and municipal courts, which all adopt the methods of executive justice rather than of judicial justice, and proceed more by the application of "a trained intuition" to the facts of a particular case than by articulate reasoning along legal lines.[2]

THE ADVANTAGES OF ADMINISTRATIVE TRIBUNALS

We have observed above that the main reason for the recent growth of administrative law in England is the great extension in the functions of government which has taken place during the last thirty or forty years, and the need for providing tribunals which would be free to determine controversies arising in connection with the new social services with more regard for modern conceptions of social obligation than for the strict enforcement of individual legal rights; which would create standards

[1] Roscoe Pound: *The Spirit of the Common Law*, p. 72.

[2] "Rule and Discretion in the Administration of Justice", 33 *Harvard Law Review*, p. 973.

of conduct and attainment in regions previously uncharted by the law; and which would dispose of their business more rapidly and cheaply than the ordinary courts of law. We may now ask what are the advantages and disadvantages possessed by such tribunals. Do they work as effectively in their own sphere as the courts of law? Have they fulfilled the purposes for which they were created?

To start with the advantages, it may be said at the outset that administrative justice is on the whole considerably cheaper than the machinery of the courts. I have not been able to obtain exact figures as to costs, and in any case it would be difficult to draw comparisons between dissimilar jurisdictions, but it can be said without hesitation that Administrative Tribunals provide a far cheaper method of adjudication than the courts of law. By cheaper I mean less expensive to the parties concerned in the controversy. It is impossible to ascertain, without much more elaborate costing details than at present exist, what part of the expense involved in maintaining a great public department out of the revenue is incurred by the discharge of judicial functions by civil servants who are devoting some or most of their time to the performance of executive duties. But I think that there can be no doubt, having regard to the relative salary scales, accommodation, and equipment, that Administrative Tribunals in England are cheaper than the courts of law, not only to the parties, but also from the point of view of total cost. In any event, what we are concerned with here is cost to the litigants, and that must obviously be less where there are normally no court fees to pay, no

solicitors to instruct, no counsel to brief, no pleadings to print, no affidavits to swear. In claims for unemployment benefit before the Umpire and Court of Referees, for example, an insured contributor is put to no expense beyond his own out-of-pocket expenses in attending the court, and the cost of bringing witnesses to support his claim (other than the full-time salaried officials of trade unions) is paid by the Treasury. In the United States, as in England, Administrative Tribunals have been found cheaper to the litigant than the formal law courts.[1] This is a matter of some importance, when litigation is as expensive as it is in England, and particularly where such measures as the Health and Unemployment Insurance schemes make it essential that no insured person should be deterred by expense from asserting his rights.[2]

Rapidity is another advantage possessed by most Administrative Tribunals as compared with the judicial courts. The freedom which enables a government department to dispense with an oral hearing, to abandon the intricate procedure which attends pleading and trial in an action at law, to waive the elaborate rules as to the proof of facts and admissibility and relevance of evidence, which are rightly insisted upon in a court of law, results normally in an immense saving of time in the determination of controversies. In 1925 the Courts of Referees were every month disposing, on an

[1] Cf. W. H. Pillsbury: "Administrative Tribunals", 36 *Harvard Law Review*, p. 407, H. L. McClintock: "Public Land Controversies", 9 *Minnesota Law Review*, p. 649.

[2] See on this point the letter from the Minister of Health to the British Medical Association, *British Medical Journal Supplement*, October 16, 1926, p. 173.

average, of nearly twelve thousand claims to benefit under the Unemployment Insurance scheme; and the Umpire, who approaches more nearly to a court of law than most Administrative Tribunals, was deciding between two and three hundred appeals from these decisions every month.

Occasionally, however, an Administrative Tribunal fails to provide a quick method of adjudication. Mr. F. H. C. Wiltshire, the Town Clerk of Birmingham, referring to appeals to the Ministry of Health against closing and demolition orders made by a local authority under the Housing Acts, remarks that his experience of the enquiries held by an inspector of the Ministry which follow such an appeal is "that many matters of trivial importance are introduced and the proceedings generally are of an unnecessarily lengthy character".[1] The professional associations representing the panel doctors have complained of the delay occasioned by the Ministry of Health in deciding on complaints against practitioners.[2] But these are exceptions to the general experience, and in the former instance are largely due to the unsatisfactory qualifications of the inspectors of the Ministry of Health, who are not properly fitted for the discharge of judicial functions. On the whole, Administrative Tribunals have everywhere been able, both in England and in America, to dispose of their business more rapidly than the courts of law, for the simple reason that their procedure is less complicated.[3]

[1] F. H. C. Wiltshire: "Appellate Jurisdiction of Central Government Departments", *Journal of Public Administration*, vol ii No. 4, October 1924.

[2] Royal Commission on National Health Insurance, Minutes of Evidence, Appendix, part iii. p. 471.

[3] W. H. Pillsbury, *loc. cit.*, H. L. McClintock, *loc. cit.*

The desire to obtain rapid methods of adjudication has, indeed, as I have already pointed out, been one of the secondary causes which has led to the growth of administrative law in England.[1] Efficient public administration is essential in the provision of modern social services, and one of the conditions of efficiency is that controversies arising out of the conduct of such services shall be determined, if not with the arbitrary and often irresponsible swiftness of a private employer, at any rate not with the cumbersome slowness of a court of law. Even the late Professor Dicey, who deplored the transference of authority from the judiciary to the executive, which he thought "saps the foundation of that rule of law which has been for generations a leading feature of the English constitution", was compelled to admit that when the State undertakes the management of types of business which previously have been carried on by each individual citizen simply with a view to his own interest, the government will be found to need "that freedom of action necessarily possessed by every private person in the management of his own personal concerns". If a man of business, he said, were to attempt to conduct his affairs in accordance with the rules which quite properly guide our judges, he would be bankrupt at the end of a year. How, asked Dicey, could any trade prosper if it were in the hands of a

[1] This again is true of the United States: cf. Pillsbury, *op. cit.* "The last twenty years have seen a marked increase in administrative Courts, notably with respect to public utility, trade, workmen's compensation and labor boards or commissions. These boards have been created in response to a public demand for increased efficiency of government and to meet special needs, and are in the main satisfactorily accomplishing the objects for which they were created."

man who could not dismiss a clerk until conclusive proof of fraud or misconduct was obtained, or if no evidence were allowed unless it were what lawyers call "best evidence"? The management of a business, he observed, is not the same thing as the conduct of a trial, and the two things must be governed by totally different rules.[1] The spheres of action in which Administrative Tribunals have been set up are, in nearly all cases, those in which the State, either through the central government or the local authorities, has "gone into business": in public health, in education, in housing. The connection between rapidity of adjudication and efficiency of administration is, as Dicey points out, a very close one.

One very important advantage possessed by Administrative Tribunals is the fact that they can be manned by individuals possessing special experience or training in particular fields. Law has its own technique, and it is a very valuable one. But there are many classes of cases in which specialised knowledge of other kinds is required in order that a good decision may be arrived at.[2] The High Court of Justice is to some extent divided into specialised compartments; certain judges take

[1] A. V. Dicey: "The Development of Administrative Law in England", *Law Quarterly Review*, xxxi. p. 148.

[2] The question of establishing special Tribunals of Commerce has often been discussed in England. See, for example, the Reports of the Select Committee of the House of Commons on Tribunals of Commerce of 1858. The question of setting up bodies possessing judicial powers and presided over by commercial men was added to the terms of reference of the Royal Commission on the Reform of the Courts of Law of 1867. The Commission reported adversely to the suggestion, but recommended that the judge in commercial cases might be assisted by two skilled assessors to advise on technical matters of business. Cf. *Life and Correspondence of Rt. Hon. Hugh Childers*, by Lieut.-Colonel Spencer Childers, vol. i. p. 148.

admiralty, divorce, and probate cases, others deal with the commercial list and the revenue appeals. Nautical assessors assist the judge in shipping disputes,[1] and expert witnesses are called in cases where scientific or artistic matters are in issue.

But these arrangements do not cover the ground over which the functions of government now extend. Expert witnesses are only too often hired assassins of the truth; and even if they were "just men made perfect", the assimilation of technical facts at short notice, through the testimony of another individual, is a different thing from a first-hand knowledge of the groundwork based on personal experience or training. But in any case a court of law is in practice dependent for its facts on the evidence furnished by the parties to the dispute, and no matter how inadequate that evidence may be, the court cannot travel outside it, except in regard to a few matters of common knowledge of which "judicial notice" may be taken. Even in a petition for divorce the judge cannot ask the petitioner whether he or she has anything to reveal which the court ought to know, although concealment of a matrimonial offence may be fatal to the petitioner's cause if the King's Proctor intervenes. "It is a misfortune", said Mr. Justice Hill recently in commenting on the "unsatisfactory condition" of the law in this respect.[2] A court of law has, therefore, but few facilities for acquiring on its own behalf information of social facts;[3] and even if the judge possesses great personal knowledge

[1] The Banshee (1887), 56 L.T., p. 725.

[2] Sutton *v.* Sutton (King's Proctor showing cause), *The Times* newspaper, March 8, 1927.

[3] Cf. Roscoe Pound: *The Spirit of the Common Law*, pp. 214-215.

of a particular subject, he is not supposed to consider facts which are not proved in evidence. In the United States there is apparently a greater latitude permitted in this respect than in England. We find, for example, that the judicial opinions of Mr. Justice Brandeis, of the Supreme Federal Court, are "replete with references to the contemporary conditions, social, industrial and political, of the community affected".[1] A study of these opinions, says Judge Cardozo, is an impressive lesson in the capacity of the law to refresh itself from extrinsic courses, and thus vitalise its growth.[2] But this ability on the part of courts of law to obtain outside information on social phenomena is extremely rare even in America; and there is a distinct movement in the States to establish what are called "fact-finding" bodies, which has arisen partly from the inadequacy of the ordinary courts to investigate or assess difficult social questions in regard to which ordinary witnesses called by the parties do not suffice to reveal the whole story.

Administrative law enables men possessing special knowledge to judge the case, or at least to assist in the business of adjudication. The tribunals which advise the Minister of Health in regard to complaints made against panel doctors under the Health Insurance scheme consist of medical practitioners as well as lawyers. The referees whom the same Minister appoints to sit locally to hear appeals in disputes between approved societies and their

[1] Truax *v.* Corrigan, 257 U.S, p. 312; Adams *v.* Tanner, 244 U.S., pp. 590, 600; B J. Cardozo: *The Growth of the Law*, p. 117.

[2] *Ibid.*

members are assisted by medical assessors in medical cases, and by women experienced in social work where the complainant is a woman. The representative members of the Courts of Referees which hear claims for unemployment benefit consist usually of employers and workers, and their practical experience on questions of fact, such as trade usage, misconduct, and what constitutes "genuinely seeking work" is of great value and makes the decision of the tribunal far more convincing and authoritative than it would otherwise be. Controversies under the Merchant Shipping Acts are decided by Marine Superintendents employed by the Board of Trade, officials who have usually had a long experience of the merchant service. Appeals to the Ministry of Health under the Public Health Acts are, it is understood, decided in accordance with the advice of sanitary and civil engineering inspectors. The Federal Trade Commission in America has at its disposal a large staff of economists, accountants, and specialists in various fields, in addition to a corps of lawyers.[1]

In some cases the need for specialised knowledge has been so great that the judicature has itself asked for an administrative tribunal to be established. An interesting example of this is provided by the history of the railway control courts.[2] The Railway and Canal Traffic Act (1854) originally pro-

[1] Many other tribunals in the United States are both investigating bodies and courts, and may employ engineers and experts of their own to enquire and report in pending cases. Cf. H. J Laski: *Grammar of Politics*, p. 393: "The findings of an expert commission have a validity to which no judicial examination can pretend; the decision, for example, of the New York Public Service Commission that a gas company ought to provide gas service for a given district is almost inevitably more right than a decision pronounced by the courts in a similar case."

[2] See Chapter III.

vided that where a complaint against a railway company as to service or rates was made out to the satisfaction of the High Court, the court should remit the case to the Board of Trade, which, through its executive officers, should propose a scheme for the better arrangement of the traffic and for the removal of the grievance, which should then be subject to the approval and enforcement of the court. Through the influence of the railway companies,[1] all reference to the Board of Trade was struck out of the Bill, and the sole provision made was for proceedings in court before a judge, assisted if necessary by an engineer or barrister. The court or judge could, on complaint, direct and prosecute by such mode and by such barristers, engineers, and other persons, all such enquiries as it thought proper to form a just judgment on the complaint.

Lord Campbell, who was then Lord Chief Justice and later Lord Chancellor, said, in his speech on the Bill when it reached the committee stage in the House of Lords, that it contained a code which the judges could not interpret. The Bill sought to turn the judges into railway directors. No rule was laid down which they were to enforce. The essence of the measure was to be found in the section which said that the railway companies ought to act honestly; and the common law judges were to be called upon to say whether they had done so or not. But, he continued, they had no statutory or other legal authority to which they could refer, and no precedents to guide them. Thus, in order to be able to discharge their new functions

[1] Report of Joint Select Committee on Railway Companies Amalgamation, 1872, Parliamentary Papers, vol. xiii., Reports from Committees.

"they must go as apprentices to civil engineers, and travel upon the railways, in order to acquire some knowledge of engineering, and of the manner in which these railways were conducted". The judges, he added, would have to decide whether trains had started too late, whether there was a sufficiency of carriages, whether the staff was adequate; and they would, in consequence, be "called upon to answer questions of fact, upon which they must be wholly incompetent to form an opinion".[1]

In a later speech he again returned to the charge. The Bill left the judges without guidance as to how to exercise their discretion as to what was reasonable. They were, besides, "to form a just judgment on all matters of complaint relating to railway management that might come before them, and they were to lay down a code of regulations for the government of railway companies". The judges, he continued, and himself among them,[2] felt themselves incompetent to decide on these matters. He had spent a great part of his life in studying the law, but he confessed he was wholly unacquainted with railway management. . . . He knew not how to determine what was a reasonable fare, what was undue delay, or within what time trucks or boats should be returned. "They should have a lay tribunal for the decision of questions of the nature contemplated by the Bill, and not one composed of the judges."[3]

[1] Parliamentary Debates, Third Series, vol. cxxxiii., 1854, May to June, col. 596.

[2] Chief Justice Jervis, alone of all the judges, disagreed. In a letter to Lord Stanley, who read it to the House of Lords, he said that the judges could certainly administer the Act "if they will take the trouble to work it" (Parliamentary Debates, vol. cxxxiii.).

[3] *Ibid.* cols. 1136-1137.

But Parliament preferred to listen to the interested demands of the railway companies rather than to the self-confessed limitations of the judges, with the result that a Joint Select Committee of 1872 found that the legislation in question had been practically inoperative, for the reasons anticipated by Lord Campbell.[1] The functions committed to the Common Pleas, said the Committee, "are so foreign to the ordinary functions of a Court of Justice that it is no wonder that this portion of the Act should have failed to work." As a consequence, jurisdiction under the Act of 1854 was, in the following year, transferred to Railway Commissioners appointed under the Regulation of Railways Act, 1873, and in 1888 it was again transferred to the Railway and Canal Commission. In both cases one of the commissioners was required to be a person "of experience in railway business".[2]

Where judicial functions are conferred on a large department such as the Ministry of Health, not only can the decision be made by officers who possess special qualifications for dealing with particular classes of cases, but those officers can avail themselves of all the information relating to the subject which has accumulated in the department. This pooling of knowledge, which may be organised to a high degree of perfection by means of a good system of records, contrasts strongly with the essential separatism of the courts of law, where a fixed body of law prevails over a series of unco-ordinated sets of facts. Where it is desirable to establish a

[1] Report of Joint Select Committee, *supra*, p. lxviii.

[2] Cf. Chapter III. for a full description of the structure and functions of the Railway Courts.

single standard of attainment or service over a given area, or throughout the country, as in the case of public health and sanitation, the possibility of co-ordinating decisions, which depends on the centralised collation and pooling of information, is a great advantage possessed by Administrative Tribunals over the courts of law. The judicial enforcement of national minima is more likely to be secured by Administrative Tribunals than by courts of law, to say the least, except where rigid and minute rules are laid down by statute, as in the case of the Factory Acts.

One further advantage possessed by Administrative Tribunals lies in the greater flexibility with which they are able to discharge their functions. In strict law such tribunals are not bound either by their own past decisions or by the decisions of any other authority. Administrative Tribunals in practice very often adhere to precedent as closely as the courts, and some sense of continuity is absolutely necessary for the creation of that consistency which lies at the bottom of all law and all order. But it is nevertheless a distinct advantage for a tribunal to be able to break clean away from a previous ruling which is known to have worked out badly, or where a better conclusion is now available in the light of subsequent knowledge. In several instances the Administrative Tribunal is given statutory authority to revise its own decisions on new facts being brought to light, and the doctrine of *res judicata* does not apply.[1] The greater flexibility of Ad-

[1] Widows', Orphans' and Old Age Contributory Pensions Act, 1925, sec. 29 (3); Unemployment Insurance Act, 1920, sec. 10 (2); National Health Insurance Act, 1924, sec. 89 (2).

ministrative Tribunals as compared with courts of law is indeed an inherent characteristic of administrative law during the period of its growth. For administrative law is law in the making; and law in the making is naturally less rigid than the law which is already made and administered in the formal courts.

But more important than flexibility in this sense is the fact that an Administrative Tribunal can enforce a policy unhampered by rules of law and judicial precedents. It can never be forced into the situation in which judges are sometimes placed, when they confess themselves compelled by law to decide in favour of one party, who claims redress as of right, when on the merits of the case they would prefer to decide in the opposite sense. Of all the characteristics of administrative law, none is more advantageous, when rightly used for the public good, than the power of the tribunal to decide the cases coming before it with the avowed object of furthering a policy of social improvement in some particular field; and of adapting their attitude towards the controversy so as to fit the needs of that policy.

THE DISADVANTAGES OF ADMINISTRATIVE TRIBUNALS

The advantages of Administrative Tribunals are, we have observed, the cheapness and speed with which they usually work; the technical knowledge and experience which they make available for the discharge of judicial functions in special fields; the assistance which they lend to the efficient conduct of public administration; and the ability they possess to lay down new standards and to promote a policy of social improvement.

But these tribunals, like other human institutions, have defects as well as merits; and we shall now endeavour to indicate some of the more obvious disadvantages of administrative justice as it exists in England at the present time. Many of these drawbacks are not inevitable or inherent in the very nature of administrative law, but could without difficulty be remedied.

One great disadvantage is the lack of publicity which attends the work of Administrative Tribunals. In the exercise of judicial functions by great departments such as the Ministry of Health and the Board of Education, there is usually no oral hearing, though each side must of course have an opportunity of stating its case in writing; and even where there is a hearing, it is not open to the public. The rules of procedure laid down for the Courts of Referees on Unemployment Insurance specifically exclude both the general public and the press from being present.[1] Reports of decided cases are not published, except by National Health Insurance tribunals, and by the Umpire in regard to claims for Unemployment benefit. Nor are the reasons for the decisions disclosed, save in the instances mentioned above.

These are real disadvantages. Without publicity it is impossible to predict the trend of future decisions, and an atmosphere of autocratic bureaucracy is introduced by the maintenance of a secrecy which in the ordinary course of events is quite unnecessary. There is no inherent reason why these disadvantages should attach to administrative justice. There can be no objection to permitting the public to attend

[1] Statutory Rules and Orders, 1921/594.

hearings when they are given or to requiring all administrative agencies which perform judicial functions to publish reports of their decisions, at regular intervals, giving reasoned arguments for the conclusions. The public could without difficulty be made to understand that the reported cases were not to be regarded as immutable precedents to be followed inflexibly on all future occasions, but taken merely as indications of the direction in which the mind of the tribunal was moving—a direction which would be subject to change if circumstances so demanded. In this way it would be possible to obtain a body of informed criticism on the work of the tribunal which would have a beneficial effect not only on those sections of the public coming under its jurisdiction, but also on the tribunal itself. One reason for the accumulated mistrust and irritation which prevailed among the responsible members of county councils at the manner in which the Minister of Health decided contested applications by borough councils for county borough status, and for extensions of boundaries by county borough councils, arose from the secrecy which shrouded the work of the Minister. Had the Department allowed the light of publicity to shine on their proceedings, it is conceivable that they might not have suffered a loss of their jurisdiction in these important matters.[1]

The history of the Provisional Order method of enlarging and creating county borough councils—the Provisional Order being in some cases virtually a judicial decision of the Minister which is subsequently embodied in a statute—bears out in a

[1] Royal Commission on Local Government, First Report and Minutes of Evidence, 1925.

remarkable manner the warning uttered in the House of Commons more than fifty years ago, by an acute member of that assembly, Mr. J. G. Dodson, member for East Sussex, Deputy Speaker and Chairman of Ways and Means Committee. He moved, on March 15, 1872, a series of resolutions for improving the machinery of the Provisional Order system as a substitute for local Bills, observing, that where great interests are at stake and feeling runs high, people are not satisfied with an order made on the decision of an official sitting in a government office on evidence which nobody knows, and on grounds which are kept secret,[1] nor with an order made on the decision of a government inspector sent down to make some general enquiry and liable to hear only *ex parte* statements. Provisional Orders, he said, to be generally acquiesced in, should be obtainable on application to a tribunal of a judicial character, possessing public confidence, before which promoters and opponents should be heard in open court. The influential county councillors, whose dissatisfaction led in 1926 to the sweeping away of the Minister's powers in regard to the determination of disputes relating to the creation and enlargement of county boroughs, might have been more contented with the Minister's jurisdiction had his power been exercised openly and in the full light of publicity. As the official evidence disclosed, the system was in many respects an excellent one. But secrecy killed it.

Another important defect in the working of Administrative Tribunals is the poor quality of the investigation into questions of fact which often

[1] Parliamentary Debates, Third Series, 1872, vol. ccx., cols. 17-20.

takes place. I have already pointed out that one of the advantages of administrative justice is that it enables men with training or experience in special fields to take part in the determination of disputes, and also provides a means for using knowledge which has accumulated in a department. But special knowledge of a subject does not necessarily fit a man for the difficult task of eliciting the truth from intractable witnesses, nor give him the authority required to get at essential sources of information, nor enable him to distinguish successfully between those portions of the judicial procedure which are cumbersome and at times unnecessarily elaborate and long-winded, and those parts of it which are indispensable to a fair trial of any kind.

Laymen are often prone to be impatient at the formality and rigour of the procedure in a court of law; but its value has sometimes become evident after it has been abolished. The lack of confidence in the National Health Insurance tribunals expressed by some of the doctors' associations before the recent Royal Commission was based, ostensibly at any rate, on defects of procedure. Thus the Medical Practitioners' Union protested loudly and at length against such features of the prevailing system as the presentation to the complainant of correspondence between a panel doctor and the Medical Service Sub-committee, relative to a charge made against the doctor; the submission to the Medical Sub-committee of letters from the complainant, which frequently contain "irrelevant and prejudicial matter" unsupported by oral evidence; and the presence during the hearing of all the witnesses, complainant, and accused, who are thus

able to hear each other's testimony and adjust their own evidence so as to produce a consistent story.[1]

The whole method of establishing facts in English law, which lays far more stress on exact methods of proof than other legal systems, is based on the oral hearing, and the examination and cross-examination of witnesses thereat by trained lawyers representing the parties to the litigation. Administrative Tribunals very often rely on unsworn written statements, unsupported by verbal testimony given on oath and subject to cross-examination. The judicial decisions of the Ministry of Health in regard to housing and public health matters, for example, are largely based on written memorials. The weakness of the Umpire's Court and the Courts of Referees lies in the fact that evidence is given in writing. The employer of the worker claiming unemployment benefit has usually little interest in the case, and often does not turn up at the hearing. The applicant appears in person, while the evidence against him is in writing, and cannot therefore be scrutinised like verbal testimony. When it is remembered that both these courts provide an oral hearing, and are presided over by experienced lawyers, it can well be imagined that the evidence which is normally taken in cases decided by civil servants without legal training is poorer still, both in regard to quality and quantity. It is clearly not desirable to require that the long-winded and elaborate methods of taking evidence which are proper to a court of law should be introduced into every dispute decided in Whitehall; but

[1] Royal Commission on National Health Insurance, 1925, Appendix to Minutes of Evidence, part iii. p. 470.

Administrative Tribunals would be better equipped to do their work if they were given the power to call for documents and compel the attendance of witnesses. Furthermore, an oral hearing should always be available where it is asked for by one of the parties; and the evidence should then be given in person at that hearing. Each party would thus have an opportunity of controverting the statements of the other side in a manner which is impossible, or at least difficult, where there is a mere exchange of written documents.

This does not mean that a "Day in Court" is to be held automatically in connection with every trifling dispute with which an Administrative Tribunal has to deal. But either party should be able to claim an oral hearing if he wishes. In a very large number of cases a desire to save expense, or to avoid personal attendance, or the existence of agreement as to the facts, would prevent the right to an oral hearing from being exercised.

Quite apart from the improved facilities for sifting evidence which "the Day in Court" offers, there is a satisfaction in confronting judge and opponent, in seeing the judicial process at work as it were, which has an important psychological effect in obtaining assent to the authority of a tribunal and is not easily produced by a system of written communication. Nor is it desirable that lawyers should be prevented from practising before such tribunals.[1] The interests of speed can be safeguarded by maintaining a simple form of procedure, the interests of cheapness by prescribing

[1] Cf. Roscoe Pound: "The Administrative Application of Legal Standards", 44 *American Bar Association Reports*, p 464.

a low scale of fees; and the flexibility and freedom of the tribunal maintained by what is in any event the only possible means: namely, by manning it with men whose minds are not set in rigid grooves, and who are capable of continually enlarging their horizon in accordance with the needs of the day. "Executive discretion", says Professor Laski, "is an impossible rule unless it is conceived in terms of judicial standards"; [1] and one of the most certain methods of translating executive discretion into judicial standards is by allowing legal practitioners to analyse the decisions of a tribunal, and reduce them to definite order and coherence. What is now badly wanted in our governmental system is a co-operative effort between the legal mind and the administrative mind; the administrator pushing the law into uncharted provinces where new standards are required, the lawyer insisting that those standards shall be formulated in terms which are capable of judicial application. For this reason, among others, I think that lawyers should not be barred from appearing before any Administrative Tribunal whatsoever.

THE BOGEY OF POLITICAL INTERFERENCE

A great deal is often made of the allegation that Administrative Tribunals are incapable of acting impartially, but must, from their very nature, be subject to political interference from the government in power. The late Professor Dicey was obsessed by a fear of this danger; [2] and Sir Frederick Pollock

[1] H. J. Laski: *Grammar of Politics*, p. 301.

[2] A. V. Dicey: *Law and Opinion in England* (2nd ed.), Introduction, p. xli. *seq.*; "Development of Administrative Law in England", xxxi. *Law Quarterly Review*, p. 152.

seems apprehensive on the same score when he speaks of the ever-growing tendency "constitutional traditions and safeguards notwithstanding, to confer more and more discretion, often of a substantially judicial kind, on officials of the great departments of State, who practically cannot be made responsible".[1] Dicey admitted that there would be responsibility in the sense that the Minister in charge of the department exercising judicial functions would be liable to Parliamentary censure, but he thought that conformity to the wishes of the majority party in the House of Commons would be no security that the rule of law would be obeyed and only a feeble guarantee against "action which evades the authority of the law courts". He regarded the judicial powers of the National Health Insurance Commissioners—the precursors of the Minister of Health—as tainted with the likelihood that they would play for favour with the electors in the discharge of their judicial functions.

As a matter of fact there is no evidence whatsoever which goes to show that the Administrative Tribunals now working in England are any more liable to political interference than the admittedly independent courts of law. It is as unscientific to *assume* without evidence that the former will be biased on political grounds as it would be for a fanatical believer in direct election to assume that judges will be autocratic and irresponsible merely because they are independent and largely uncontrolled by popular action.

The National Health Insurance scheme is, as a matter of fact, an example which supports an exactly

[1] Sir F. Pollock: *The Genius of the Common Law*, p. 43.

opposite contention from the one which Dicey used it to illustrate. On December 27, 1911, a Treasury minute was issued in which the Chancellor of the Exchequer called the attention of the Board of Treasury to the position of the Insurance Commissioners in relation to the Board. The functions of the Commissioners, said the minute, fall into two categories: judicial and executive. "The former functions, though by far the less numerous, are very important, and, in order to secure the necessary independence with regard to them any provision making the action of the respective Commissioners subject to the direction or control of the Board of Treasury was deliberately excluded from the statute. Similar independence, however, clearly cannot be granted to the Commissioners in respect of acts of a purely executive character", which would have to be defended in Parliament and in regard to which "Their Lordships must have a deciding voice." [1]

So far, then, from the Chancellor of the Exchequer attempting to influence the Commissioners in their judicial decisions—despite the fact that they were appointed, and could be dismissed, by the Treasury—he was insisting upon a separation of judicial and administrative functions, and calling for an independence and an impartiality in regard to the exercise of judicial power so complete that the observance of it became a positive embarrassment to the Commissioners in their administrative work.

The majority of disputes coming before the Commissioners in their judicial capacity were, at the outset, appeals by members of approved

[1] See Parliamentary Debates, vol. xxxvii., Fifth Series, col. 590, April 18, 1912, Mr. Masterman's speech.

societies against decisions made under the rules of the society, in regard to claims for sickness benefit by members. The rules of the societies were subject to approval in the first instance by the Commissioners, but great pressure of work in getting the scheme into operation prevented the rules from being carefully scrutinised before approval, with the result that many of them were defective and failed to provide cheap, quick or convenient access to the tribunal of first instance—that is, the Domestic Tribunal of the approved society. The strict separation of judicial and executive functions laid down by the Treasury minute severely handicapped the Commissioners from taking administrative action to remedy this unsatisfactory state of affairs, for the Commissioners were told that, as they had the power of giving a final judicial decision on appeal, they had no right to intervene administratively at any earlier stage in the proceedings. But having regard to the unsatisfactory rules which existed and still exist in many approved societies, such a preliminary intervention is often essential if injustice is to be prevented. So difficult was the task of administration rendered at times by the maintenance of judicial aloofness that the Commissioners were more than once driven to consider whether it would not be better for them to abdicate their judicial functions for the sake of the greater executive freedom which they would acquire by so doing.[1]

[1] Furthermore, there were certain conflicting decisions in cases under Section 66 of the Act of 1911 made by the Scottish, Irish, Welsh, and English Insurance Commissioners respectively. The chairman of the Joint Committee complained that this would raise difficulties if he were called upon to defend these conflicting decisions in Parliament—to which reply was made by one Commissioner that judicial decisions do not require "defending".

Another example of the independence of administrative agencies from "political" interference in the discharge of their judicial duties is provided by the action of the District Auditor in the Poplar wage case. The District Auditor is appointed by the Minister of Health, and is removable by him. The Minister is also authorised by statute to regulate the Auditor's work, which consists of examining the accounts of local authorities, and surcharging the members or officials with unlawful expenditure. In 1923 Mr. Carson Roberts, one of the auditors for the London District, surcharged the members of the Metropolitan Borough Council of Poplar in the sum of £5000, in respect of their having paid the municipal employees of the borough a minimum wage of £4 per week, which he regarded as excessive, and therefore unlawful. The councillors appealed to the King's Bench Division of the High Court, which upheld the Auditor. In 1924 the case went to the Court of Appeal, which by a majority quashed the surcharge. By that time the first Labour Government was in office, and the Minister of Health was Mr. J. H. Wheatley, whose advanced views on social and economic matters made it extremely likely that he must have been in favour of a £4 minimum wage being paid to municipal workers, if not to all employees throughout the country. Nevertheless, the District Auditor, despite the general outlook of the Government and the political views of this particular Minister, carried the appeal to the House of Lords, where the surcharge was upheld.[1] Whether the Auditor consulted the Minister before taking action is not known

[1] Roberts *v.* Hopwood (1925), A.C., p. 578.

to the public, nor is it suggested that he acted with impropriety or without due regard to departmental discipline. But it seems clear that the avowed political sympathies of the Government did not for one moment influence the action of an official who felt himself bound to act, in the discharge of functions of a judicial nature, in a manner which appears to have been antagonistic to those sympathies.[1]

It is true that one swallow does not make a summer; but important cases of this kind, especially when there is an absence of any evidence to the contrary, go a long way towards disposing of the bogey of political interference in regard to the discharge of judicial functions by administrative agencies, which is always raised against administrative justice.

It is admittedly difficult for an administrative body to maintain a genuine impartiality in the discharge of judicial functions. But then it is difficult for any individual or any body of persons to maintain impartiality, which is the least "natural" of all the mental conditions required by civilised society. That difficulty is, however, increased when natural impulses are not to some extent disciplined by resort to the "artificial reason" of the law. On the other hand, public administration in modern England, particularly in the central departments, provides a continuous training in habits of mind no less impartial in their own sphere than are those of the judiciary; and it is impossible, taking the facts as we find them, to discover any grounds for ascribing a lack of impartiality to the discharge of judicial functions

[1] Cf. W. A. Robson: *The District Auditor* (a pamphlet) for full particulars of the Auditor's position and his action in this case.

by administrative agencies. It may be true, as Mr. Gerrard Henderson suggests,[1] that the maintenance of real impartiality is made specially difficult in a large organisation by the formation of personal friendships, group loyalties, and other ties which make for conflicting allegiances; but we think that the danger may be prevented by certain safeguards which we shall shortly suggest.

The real disadvantages attaching to administrative justice in the form in which it now appears in England are, in my opinion, the lack of publicity which attends the work of most tribunals, the air of mystery and secrecy in which their deliberations are shrouded, the failure in most cases to give reasons for the decisions, or to publish reports of decided cases; the denial of a hearing in the majority of instances; and the poor quality and insufficient amount of the evidence on which decisions are often based. But so far there is nothing to show that administrative law has led to political interference with judicial determinations. There are indications, on the contrary, that in certain cases the desire to maintain impartiality in the discharge of judicial functions has actually hampered administrative action before trial.

THE STRUCTURE OF ADMINISTRATIVE TRIBUNALS

In the foregoing pages I have spoken repeatedly of "Administrative Tribunals" when referring to the organs through which administrative law is exercised. But this is only a generic name for describing the various executive authorities on

[1] *The Federal Trade Commission.*

which judicial powers have been conferred, for those authorities differ widely as regards the machinery through which their powers are exercised. At one end of the scale are definite courts such as those of the Umpire and the Courts of Referees for Unemployment Insurance claims; at the other end are amorphous departments such as the Board of Education, in which there appears to exist no specially-differentiated organ for fulfilling the judicial functions with which the Board is charged.

The composition of the Tribunals varies enormously. In the Ministry of Health appeals regarding complaints against practitioners engaged in Health Insurance work are heard by advisory boards of referees, consisting usually of one lawyer and two doctors; while appeals from Closing Orders and other Sanitary Orders made by local authorities are decided by administrative officials, presumably in the ordinary course of their work. An inspector of the Ministry reports in this type of case but does not decide. His recommendations are by no means taken for granted, we learn from a Principal Assistant Secretary of the Ministry, and he is often cross-examined severely by higher officials on his report and its findings.[1] There is, indeed, in the majority of cases, nothing that can really be regarded as a distinct tribunal with a separate identity of its own: not even a special judicial division within the department. The papers are sometimes passed round in the ordinary way till they

[1] I. G. Gibbon: "Appellate Jurisdiction of Central Government Departments", *Journal of Public Administration*, vol. ii. No. 4, October 1924.

reach the deciding officer ; or an internal conference may be held within the department, the final decision being the outcome of an informal co-operative effort between several officials.

The question what is the best composition for an Administrative Tribunal is not an easy one to answer, but I have no hesitation in saying that in all cases a definite, appointed and known tribunal should be created to discharge whatever judicial functions a department may have to perform. There might be separate tribunals within a single department for separate classes of cases, but in every instance a distinct and recognisable tribunal should exist. It is undesirable from the public point of view that the members of the department who make judicial decisions should be unknown and unascertainable. The demand made by Mr. Arlidge that he should be told " which, in this great department of State, were the actual minds or mind which judged his case " was based on a deep-seated human instinct which makes a man want to face his judge. And although Lord Shaw referred to the request as " a grotesque demand to individualise the department for private purposes ",[1] there is no insuperable objection to that being done.

The idea that the Minister should create a definite tribunal is in no way antithetic to departmental discipline or ministerial responsibility. The individual members of the tribunal might be officers on the staff of the department as at present, and would in the last resort be removable by the Minister. But the mere fact of being formally appointed to judicial duties within the department

[1] Local Government Board *v.* Arlidge (1915), A.C., p. 120.

would give them an added sense of responsibility, and a valuable feeling of independence, which would not be diminished by their being required to conform to departmental policy in a way which I shall shortly describe. There are already many important officials who are specially appointed to positions within a department, such as inspectors of schools, engineering inspectors, marine superintendents, and so forth ; and in such cases there results a disciplined and qualified independence, a co-operation rather than a subordination, which is broadly what is required for the work of Administrative Tribunals.

Furthermore, by the appointment of a definite tribunal it is possible to ensure a fair measure of that intellectual continuity which is a necessary element in the judicial process. In all judicial functions, the person who enquires into the facts should also decide the issue. The formation of sound judgment seems to require that the preliminary survey of the ground should be undertaken by the same mind that subsequently evaluates the facts and determines the issue. When the judicial function is disintegrated and spread over several individuals in a large department, this cohesion between the related psychological processes of enquiring into facts and evaluating those facts in the final decision is lost, and the whole function deteriorates. The only certain way of maintaining essential intellectual unity is by establishing definite tribunals manned by one or more individuals who are responsible for the decision in all its stages.

The knowledge that the mind which enquires is also the mind which decides may be an important

asset in securing that feeling of confidence in the authority of a tribunal which is an important requisite for the satisfactory administration of justice. One of the grievances put forward by the British Medical Association in connection with the Administrative Tribunals concerned with National Health Insurance is that no necessary connection exists between the opinions formed by the enquiring agency and the conclusion made by the deciding authority. When, said the Association, agreement has been reached with the profession as to the machinery and procedure for arriving at decisions in regard to complaints against doctors "it is exceedingly disquieting to find that, though the machinery is used and the procedure followed, there are cases in which there seems little or no relationship between the decisions of the Ministry and the reports or recommendations of the bodies on which action is supposed to depend".[1] It is an extraordinary thing, said the representatives of the Medical Practitioners' Union, that in coming to a decision the Minister acts not only upon the report of the particular case, but upon departmental reports from the officers of the Ministry and other statements of which neither the appellant nor the enquiring body have any knowledge.[2]

It seems clear that a unification of the business of enquiring and the task of deciding is necessary for the proper performance of the judicial function. Unification is advantageous both from the point of view of establishing an intellectual continuity between related psychological processes, and from the

[1] Royal Commission on National Health Insurance, Appendix to Minutes of Evidence, part iii. p. 450.

[2] *Ibid.* p. 470.

point of view of securing confidence in the decisions of the Administrative Tribunal concerned.

Incidentally, this unification would often give a department much greater freedom in its administrative work than it might otherwise possess. "No individual", observed Mr. Hoover recently, "should be at the same time legislator, policeman, prosecutor, judge and jury".[1] He was referring to the blending of powers in various bureaux and commissions in the United States, and spoke of the "striking instances of oppression through the combination of semi-judicial with executive powers" committed by such bodies as the Bureau of Internal Revenue and the Immigration Bureau, which were, he added, caused less by the fault of the administrators than by the system. It is sometimes necessary, in the interests of good government, to confer legislative and administrative and judicial powers on a single department. But that does not make it impossible to avoid the disadvantages of combining the duties of policeman, prosecutor, judge, and so forth in a single officer. Separation of function within a department is always a desirable feature, and is always practicable, even though at the apex of the pyramid a single Minister is responsible for all functions. The allocation of all the judicial business to one or more distinct tribunals within the department is a necessary step in the attainment of this end. An official in charge of one branch of administration will not feel that it is necessary to stay his hand administratively in the interests of impartiality merely because the matter in question may eventually be adjudicated upon by another branch of the

[1] "Government by Guess", *Nation*, New York, December 9, 1925.

office. But if he himself is potentially the judge *in futuro* he may (as in the case of the Insurance Commissioners) feel reluctant to intervene.[1]

It is desirable not only that definite tribunals should be nominated for the discharge of judicial functions, but also that special "court" rooms should be allocated for the deliberations of the tribunal. The influence of physical environment on human beings is a subtle thing; and the mental association of a particular place with the exercise of judicial functions may help to produce an atmosphere in which a man feels more impartial and independent, less the creature of prejudice and habit, than in other surroundings where he is accustomed to do work of a less exacting or more subordinate nature. It is even desirable, where possible, that the tribunal should sit in a room outside the ordinary departmental offices; and several departments of State might together maintain one or two "court" rooms for this purpose, and share the expense among them.

But these considerations are of less importance than the question of the actual composition of the tribunal. The administration of justice, whether carried on by the judicature or by special tribunals, depends, to a greater extent than many institutions, on the calibre of the personnel. Organisation is comparatively unimportant.

When we examine the type of individual concerned in the operation of administrative justice in England, we are once again confronted with a bewildering diversity. Lawyers, business men and representatives of workmen deal with unemploy-

[1] See p. 285 *ante*.

ment insurance, doctors with health insurance, engineers with public health questions, accountants with local government expenditure, gas engineers with the regulation of the gas supply, civil servants of the higher ranks with various other affairs. Can any working rule be laid down as to what sort of qualifications are required?

"In choice of Committees for ripening Businesse", said Francis Bacon, "it is better to choose Indifferent persons, than to make an Indifferency, by putting in those that are strong on both sides". But while it is better to have persons who are "Indifferent" in the sense that they are not prejudiced in favour of either side, it is not desirable that the personnel of Administrative Tribunals should be "Indifferent" in regard either to their training or natural capacity. Administrative law, as I have already pointed out, has been largely directed towards the setting up of new standards in hitherto unexplored fields; and it is almost impossible to achieve this in many spheres of social control without special qualifications. The "laymen" on the Courts of Referees are in reality specialists in the conditions of industrial employment. The Royal Commission on the Coal Industry, when it recommended that a national authority should be set up for settling wage disputes, urged that a "third impartial element" should be given a place on the authority. But that impartial element was not to consist of amateurs who would be selected as occasion required from other fields and remain unacquainted with the special problems to be considered, but would comprise persons who would have "full opportunity of gaining through ex-

perience familiarity with the industry and all its underlying problems and difficulties." [1]

While technical knowledge is often needed for the adjudication of disputes, there are grave objections to giving judicial power into the hands of specialists whose outlook is confined to a single field. The worst defect of the Domestic Tribunals which we have described in a previous chapter is the opportunity they provide for narrow professional instincts and group habits to assert themselves without let or hindrance; and the main disadvantage of such tribunals is the domination of the judicial process by petty loyalties and outworn traditions which predetermine the conclusion and render an impartial investigation impossible.

What is really needed is a combination of legal training with special experience or training in the particular field in which the jurisdiction is to be exercised. One way of securing this is by including on the tribunal both lawyers and specialists. Another method is by enabling each member to become qualified in both fields. Where specialist problems have to be solved, we need young judges with a knowledge, not only of law, but of one or two other subjects as well. The administrative judiciary of the future should consist of youngish men who have had a training in law, who have taken a law degree, or been called to the bar and perhaps practised a little, and who have also a knowledge of the social sciences such as economics, or local government, or public health, or administration, or educational science. It does not matter which comes first, the law or the other specialism—both

[1] Report of the Royal Commission on the Coal Industry, 1925, p. 153.

are necessary. The tradition that judges must invariably be drawn from the ranks of successful advocates who are usually well past middle age cannot and should not be applied to Administrative Tribunals, for obvious reasons. The alternative of employing administrative officials on judicial work in their spare time, regardless of their suitability or training, will break down where great interests are at stake and important issues draw critical attention to the composition of a tribunal, as in the case of county borough extensions and cases involving medical discipline in connection with health insurance.

At times it may be necessary to reinforce a tribunal by nominating members from outside the department to assist in its deliberations. When the subject-matter of the controversies which come before the tribunal is an interference with individual liberty or property of a kind which arouses strong opposition, its authority may be greatly strengthened by the introduction of persons representing outside interests. The action of the Government in nominating a non-medical member to the General Medical Council in 1926 met with widespread approval from the general public, by whom the Council has come to be regarded with increasing distrust.[1] The difficulties met with by the Kansas Industrial Court in America were partly due to the fact that an attempt was made to settle industrial disputes by a body on which neither workers nor employers were represented, and to whose jurisdiction neither side voluntarily submitted.

[1] Cf. *The Times*, December 1, 1925, leading article on "Doctors and Advertising".

A great deal of the administrative justice of the future is likely to be concerned with the settlement of disputes in which the enforcement of the decision will depend more on its voluntary acceptance by the parties than on effective penal sanctions exerted by the police. This is particularly the case in controversies within the economic sphere, where anything in the nature of specific enforcement imposed by coercion is often impossible. Thus it will be found that in the ground which lies midway between formal litigation on the one hand and arbitration by agreement on the other, some effort to obtain voluntary submission to the findings of the tribunal must frequently be sought, and where this is the case the inclusion of representative members on the tribunal is desirable. The success of the National Railway Wages Board, which is a purely advisory body without direct powers of enforcement, is essentially dependent on the appointment of representatives of the trade unions and the railway companies as members of the Board. The remarkable growth in scope and power of the work of the Industrial Court, which is also based on the principle of voluntary acceptance, or self-enforcement of the award, is full of significance in this connection. For the Industrial Court is composed of representative membership under a neutral chairman.

THE DANGERS OF ADMINISTRATIVE LAW

This brings us to another question of great importance. What are the limitations of administrative justice as it now exists in England? Is it possible to define the frontiers? While it is impracticable to draw a line between the sort of case which can be

successfully disposed of by Administrative Tribunals and the type of controversy which must be left to bodies armed with merely advisory powers, it is possible to indicate with some certainty the kind of dispute with which Administrative Tribunals are definitely unfitted to deal.

The greatest danger with which the development of administrative law in England is faced at present is the likelihood that in the near future an attempt may be made to cut through our economic difficulties by handing over the disposal of economic controversies to official tribunals armed with plenary powers of decision and enforcement.[1] The continual interruption of industrial production by labour disputes, the allegations of profiteering in foodstuffs and other essential commodities by combinations of producers or distributors, the assertion that utility undertakings enjoying a high degree of monopoly are maintained with an eye to the making of profits rather than to the provision of service to the public: all these discontents may easily lead to an effort to resolve economic conflict by the setting up of Administrative Tribunals of one kind or another—probably with an infusion of non-official members—entrusted with powers to adjudicate upon these difficult matters. Administrative law has in the main grown out of the application of public administration to economic services, and it might appear that the public

[1] Sir Alfred Mond, M.P, for example, recently proposed, during the passage of the Trade Disputes and Trade Unions Act, 1927, that industrial disputes should be made subject to compulsory arbitration; and amendments to effect that object were put down in his name and those of other M.P.'s during the committee stage of the Bill. See the correspondence on this subject initiated by Sir William Mackenzie, K.C. (formerly Chairman of the Industrial Court), in *The Times*, May 23, 1927.

regulation of private enterprise by means of similar tribunals would follow easily in the natural course of events and be attended with equally good results.

But such an idea is based on a fallacy; or, rather, on a series of fallacies. All that a tribunal can do, whether it be a court of law or a government department or an independent commission, is either to apply the rule, to interpret a doctrine, to arrive at a "fair" decision, or to approach as near to "fairness" as is possible. But in our present economic order a quantitative manifestation of fairness does not exist. There is no such thing known to economic science as a fair price, a fair wage, a fair day's work, or a fair rate of profit. Value, wages, rent, interest and profits are not determined by any question of fairness but by the operation of a series of complex forces based on self-interest and the assumed desire of each person to get as much as possible for his services or his property. Any attempt to settle economic controversies by reference to a hypothetical and non-existent basis of "fairness" by means of Administrative Tribunals is almost certain to end in disaster. The mediæval regulation of trade and industry all hinged around the conception of the fair wage and the just price and so forth; but even in those far-off days neither canon law nor common law were able to evolve workable or even recognisable standards of what economic justice demanded, and in our own time such an attempt would be utterly futile.

Professor Ernst Freund, writing of the attempt in the United States to give jurisdiction to various tribunals, such as the Inter-State Commerce Commission, over the conduct of public utility under-

takings, says that we should bear in mind that "underlying these difficulties of administrative procedure is the attempt to answer perplexing questions of economic policy by the method of trial from case to case with which we are familiar in the upbuilding of the Common Law. . . . It seems to be believed that by a combination of administrative and judicial action it will be possible to evolve a code of fair trading; perhaps it can be done in part, but it is not likely that highly controverted issues will be ultimately settled otherwise than by direct legislative action. It seems also to be believed that the like methods can settle the perpetual contest for profit and advantage which lies at the foundation of our entire economic institutions, the assumption being that there are standards of equity which should control the *quid pro quo* in service and return, as applied to undertakings affected with a public interest, perhaps even as applied to labour and wages, and which can be discovered by patient and impartial experimentation." [1] Professor Freund gives examples of the way in which legislation has conferred judicial powers in these matters. There are statutes in which Administrative Tribunals are given specific judicial power to decide questions of fraud, discrimination, monopoly, price control, unreasonable charge, inadequate service. Consider these terms, he says, and you will recognise the gradation from common legal certainty to utter indefiniteness. A grave danger in the United States, he points out, is that indeterminate powers of this kind may be

[1] Ernst Freund: "Commission Powers and Public Utilities", *American Bar Association Journal*, May 1923.

abused by using them to promote private financial interests. "The more indefinite the standard, the greater is obviously the temptation to use the law as a weapon to gain economic advantage, using the public interest as a shield." [1]

While the question of corruption is not one which need give rise to serious alarm in England, the possibility that Administrative Tribunals may be set up to discover non-existent and undiscoverable standards is a real danger. Such tribunals will not merely fail to accomplish anything, but will work much positive evil by hampering economic activity in a meaningless fashion. Their decisions will be evaded and disobeyed, and the whole fabric of the law, of which administrative justice forms a part, will be degraded. If the legislature calls upon the administration to evolve standards in matters which cannot be dealt with in that way or itself prescribes intrinsically erroneous or unworkable standards, no skill in devising procedural safeguards will produce just or beneficial results.

The legislature can itself, of course, attempt to define in exact terms what is to be regarded as the standard of fairness in such matters as wages, prices, etc., and the work of the Administrative Tribunal would then be confined to the comparatively simple task of interpreting those standards and applying them to particular cases. But it is difficult to believe that Parliament would ever try to crystallise in rigid statutory form the fluctuating and transient equilibrium of economic life. The result would be highly detrimental to industrial prosperity under any system of economic production.

[1] Ernest Freund, *loc. cit.*

This is not to say that the further control of economic life is either impracticable or improbable. All that we are concerned to point out here is that the wrong method of control is to give jurisdiction to Administrative Tribunals in vague terms containing undefined or undefinable standards, and to expect that economic conflict will thereby be resolved. Methods easily get misapplied; and the method of official adjudication, if it is divorced from administrative provision, is unsuited to the social control of private enterprise. It is legislation that must be employed for that task: definite and exact legislation, transferring economic power from private hands to public bodies, and enacted either by a sovereign Parliament, or by subordinate bodies to whom power has been delegated.[1] The legislation may aim at promoting divers objects which it is beyond our purpose to discuss here; but I venture to assert that where it is desired to bring about economic change, the method to be adopted should be by an Act of Parliament which itself effects the required object, or describes it in exact terms. Any attempt to shift the burden on to the shoulders of Administrative Tribunals is not likely to meet with success.

That is one great danger. Another great danger which confronts the development of administrative law in England is the possibility that, as the judicial powers of administrative bodies increase in scope and extent (as I believe they are likely to do in the near future), such functions may be discharged in a perfunctory manner by incompetent officials of

[1] An example of a subordinate body of this type is a Trade Board, which is not an administrative tribunal but a subordinate legislative authority.

an inferior type. The strength of the English legal system lies to no small extent in the fact that the judicature is composed of men of unusually high character, of exceptional integrity, and of legal ability beyond the normal. The average judge has never known the subordinating experience of being "employed", or the attendant liability to be dismissed; he has the assurance and the conscious independence which comes from the successful practice of a profession; and he is usually steeped in a traditional veneration for the law and all its works. Although he has to share the imperfections of human nature, he fills his office in a way which makes the judicial process universally respected, and that is no small achievement. Whether the Ministers in charge of the great departments of State will realise that the very best type of man is required for the proper discharge of judicial functions, even where the subject-matter in particular cases concerns affairs of apparently small moment, remains to be seen. But the possibility of inadequate attention being paid to the personal equation is a real danger.

THE REGULATION OF ADMINISTRATIVE TRIBUNALS

It is sometimes said by strict legalists that the discharge of judicial functions by administrative bodies would be more acceptable if their decisions were subject to review by the ordinary courts of law. The concession implied by this is more imaginary than real. If the decision of an Administrative Tribunal is liable to be upset by the courts of law on grounds other than that of defective procedure, the hearing by such a tribunal

becomes, in all important cases, a mere preliminary to trial in court, and the whole object and aim of administrative law is frustrated. It is reasonably clear that if administrative law serves any useful purpose at all—and I have argued at some length that it does—we must accept it as a system in the main independent of the courts of law, and reject any proposal to subject it to the contingent control of those courts. Otherwise we shall merely be thrown back on to the legalism and unfreedom of the formal judicature, the avoidance of which is one of the main objects sought to be obtained by the machinery of administrative justice. I have argued in the preceding chapter that Administrative Tribunals should be compelled to use their discretion judicially; that where it can be proved by an interested party that the members of such a tribunal did not hear the controversy with an open mind, or had virtually prejudged the issue; where they have misused their power to further unauthorised purposes, however well-intentioned; where they are influenced by sinister motives or extraneous considerations: then in those circumstances the proceedings should be subject to review in the courts of law, and the decisions set aside. But apart from that special type of exception, the work of Administrative Tribunals must remain independent of the courts of law, and their decisions be free from liability to be investigated and quashed.

Nevertheless, although Administrative Tribunals must normally be independent of the courts, it does not follow that there are not other methods by which their activities may be controlled. But before discussing these I would suggest that there is no

valid reason why the absolute immunity from legal liability which is enjoyed by judges should be applied to the members of Administrative Tribunals. It would be a good thing if the personal responsibility of such individuals was established at least to the extent of making them liable in the courts of law for damages where malice or negligence or interest or corruption or fraud could be proved by a party to a dispute. This suggestion is closely bound up with the proposal I have already made that definite tribunals should in all cases be set up where judicial functions are exercised by Government departments.

An important matter regarding the regulation of administrative law is the relation between the policy of the Government department and the decisions of the tribunal. One of the advantages of administrative justice, I have suggested, is the ability of the tribunal to promote a considered policy of social improvement. But at present no one knows what that policy is at any given moment, or even whether a policy exists. The result is that unnecessary confusion and uncertainty obtain, and the decisions of the tribunal appear unpredictable and often incoherent. This has been most noticeable in the case of the Ministry of Health in regard to public health and rehousing matters, and county borough status and boundary questions.

What I suggest is that, when a specific tribunal has been appointed within a department, for which the Minister in charge is responsible, the policy (if any) which it is intended the tribunal should follow should be definitely formulated and openly declared in a Letter of Reference from the Minister to the tribunal.

Perhaps I may elucidate the idea by one or two examples. Under the Public Health Acts the Minister of Health is given power to decide a large number of controversies relating to sanitary matters in such a manner as "may seem equitable" to him.[1] Under the Housing Acts,[2] again, he is given extensive jurisdiction to make such orders "as he thinks equitable". The Minister of Health no doubt has a policy in these matters, which probably varies from time to time; but no one can tell, as things are, what it is that the Minister is likely to regard as equitable. Hitherto all has been darkness and secrecy. There can be no reasonable objection to the Minister coming frankly into the open and publishing a plain exposition of the tendencies which are likely to inform the decisions of his department, a statement of the considerations which in his view should carry most weight in determining the conclusion. These statements should take the form of "Instructions" to the deciding body by the Minister. They need not be immutable; they can be changed from time to time as occasion demands. But they would serve a valuable purpose in informing the public what may be expected, and would lend coherence to what must otherwise often appear to be disconnected and unrelated decisions.

I would even go so far as to suggest that the Minister's influence over a tribunal should be confined exclusively to published Instructions or Letters of Reference of this kind; and that apart from public documents such as these there should

[1] Public Health Act, 1875, sec. 268.
[2] Housing Act, 1909, sec. 17. See Chapter III. *ante*.

be no attempt to curtail the independence of the officials appointed to serve thereon. The Minister should be required to direct the tribunal in the open, as it were, where the full light of criticism and publicity can shine on his policy. He should not be permitted to instruct the adjudicating officials secretly, nor influence them by back-stairs or haphazard methods. Furthermore, the necessity for producing a consistent policy might be valuable as a mental exercise for the Ministry itself.

It is not necessary that any loosening of the bonds of departmental discipline nor any lessening of ministerial responsibility should result from this device. The members of the tribunal, where they are exercising judicial functions entrusted by statute to the Minister, must remain amenable to his authority, and he must be answerable for their decisions in Parliament. But there is a vast difference between the subordinate official who is subject to verbal orders handed down casually from day to day as occasion demands, and the public servant, formally appointed to judicial duties within the department, who is charged with interpreting a public statement of ministerial policy, but who is otherwise largely independent so far as his judicial work is concerned, though in the last resort removable by the Minister.

Another step in the regulation of Administrative Tribunals—or perhaps we might say the regularisation—might be the establishment of higher Administrative Tribunals to which appeals could be taken. The existence of a superior authority, to which resort may be had by a dissatisfied party, diminishes the possibility of a careless or hasty decision by the

tribunal of first instance, and tends to imbue the members thereof with that feeling of accountability for their actions which lies at the bottom of a true sense of responsibility. The psychological value of appeal tribunals might be considerable, both from the point of view of the parties to the dispute and the adjudicating members of the tribunal of first instance. The main justification for a hierarchy of courts in any system of law is the careful attitude which judges tend to adopt towards their work when they know that there are others above them who are likely to scrutinise it critically, or conversely, others below them who will have to interpret and apply their decisions to differing circumstances. There is no reason why the right of appeal should not be as effective a method of control among Administrative Tribunals as it is in courts of law.[1]

Although I do not consider that Administrative Tribunals should be subjected to any greater measure of control by the courts of law than they at present receive, the existing right of review on questions of jurisdiction and procedure should undoubtedly be preserved. A suggestion was made to the writer by an eminent King's Counsel that all Administrative Tribunals should be brought within the scope of a controlling statute, which would bring them under definite regulations. The main effect of this, assuming that the actual power of final decision were not touched, would be to bring all administrative agencies performing judicial functions into con-

[1] See the remarks by Lord Hewart, L.C.J., on the valuable effect of the Court of Criminal Appeal on the administration of English criminal law, in his address to the American Bar Association, *Times*, Sept. 2, 1927. And observe, *per contra*, the moral pointed by the deplorable history of the Sacco and Vanzetti trial.

formity with a single model as regards their method of procedure and so forth. But it is difficult to see that any great advantage would be obtained by imposing uniformity in this respect on all the various tribunals which are now able to adjust their methods of procedure to the differing requirements of their particular function or jurisdiction.

THE CONTROL OF DOMESTIC TRIBUNALS

A much stronger case can be made out for the regulation of those multitudinous bodies of a private or semi-public nature which I have called Domestic Tribunals, than for interference with Administrative Tribunals. I have already indicated in an earlier chapter the nature of the judicial power exercised over their members by the governing organs of professional associations, trade unions, friendly societies, clubs and other voluntary groups or statutory bodies, and have described the almost complete freedom from review by the courts of law which the decisions of such bodies enjoy.

The power of these Domestic Tribunals is very large indeed. A trade union may condemn a man, for failure to conform to some petty trade practice, to what a learned judge described as "industrial death". The General Medical Council may deprive a doctor of his means of livelihood for associating with a skilled osteopath who is qualified abroad but not in England; for making himself or his work publicly known by any method which by a stretch of the imagination could be termed "advertising" (an offence which may include even "undue particularity or elaboration" of a name-

plate on the front door of his house);[1] or for committing any act which is regarded by his professional colleagues as "scandalous conduct in a professional sense". A West End club may ruin a man socially by expelling him for a difference of opinion with one of its leading members. Yet provided that the tribunal does not exceed the jurisdiction conferred on it by the rules of membership, the enabling statute, charter, or other instrument, the courts of law will in no circumstances review the decision unless the rules of "natural justice" have been infringed through some flaw in the procedure.

But the rules of natural justice concern what are in effect only the more superficial aspects of the case. They prescribe that the member must be given an opportunity of stating his case, that no individual who is on the tribunal may be personally interested in the dispute, and so forth. Such considerations touch merely the outward forms of justice and leave the substance of the decision uncontrolled.

There can be little doubt that much injustice results from this concentration by the courts on the forms of justice rather than on its essential spirit. In one case the expulsion of a woman from a ladies' club was declared invalid because a member of the Committee, a titled lady, who had only consented to serve on condition that she was not bothered, was not informed of the meeting which was held to consider the case.[2] But the ends of justice cannot be safeguarded by insisting on the mere notification

[1] See the text of the "Warning Notice" issued by the General Medical Council in June 1923, para. 6; also the report on this Notice drawn up by the Central Ethical Committee of the British Medical Association. Cf. Dr. Lloyd's case, reported in *The Times*, November 30, 1925.

[2] Young *v.* Ladies' Imperial Club (1920), 2 K.B., p. 523

of even a duchess, and I am strongly of the opinion that the decisions of Domestic Tribunals should be subject to review by the courts of law, even where the appellant is not able to prove malice or interest on the part of the members of the tribunal.

The distinction between Domestic and Administrative Tribunals rests on a fundamental difference of outlook. Administrative Tribunals are manned by public officials who have nothing to gain or lose by the decision, who are accustomed to administer public services impartially and without favour, who are usually unacquainted with the parties to the dispute, and who are professionally concerned only with serving the public. They are, moreover, subject to control and removal from office by a Minister of the Crown who is answerable to Parliament. A Domestic Tribunal, on the other hand, is, in the case of a vocational body, manned by men who have a direct interest in the profession or trade whose supposed interests are being protected. The members of the tribunal are extremely likely to be imbued with that intense conservatism regarding their occupation, that disposition to regard with animosity new methods or a new point of view, which is the normal expression of the professional instinct.[1] They are in nearly all cases entirely uncontrolled, and responsible to no one save their own colleagues; and they are usually accustomed to regard the public interest as of less importance than, or identical with, the prosperity of the members of the craft, so far as the conduct of the vocation is concerned. Frequently the body which creates the offence is the body which tries persons accused of

[1] Cf. Graham Wallas: *Our Social Heritage*, chapter on Professionalism.

having committed that offence. All this results in decisions which are obviously biased and informed by prejudice. The cases of the medical profession and of certain trade unions have become notorious, to say nothing of a well-known London club which was recently brought to book in the courts; but these instances are merely symptomatic of a widespread disease, which is not likely to be remedied until the decisions of such bodies are made subject to review by the courts of law.

SOME CONSTRUCTIVE PROPOSALS

We may return now to our main discussion regarding the bodies which are concerned in administrative law. "When," observes Dean Roscoe Pound, "putting aside the fictions of legal tradition, we look squarely at what actually takes place in the judicial and juristic development of legal materials, we need not fear for constitutional liberty because the commissions to which the application of so many legal standards is now committed do not proceed by the exact and certain methods of legal logic."[1] He was referring to American institutions, but the same may be said, in my opinion, regarding the extensive group of Administrative Tribunals which now exists in England. I do not myself regard the existence of the well-defined body of administrative law which now exists in England with antagonism, or feel apprehensive at the prospect of its almost inevitable extension and development in the near future.

[1] Roscoe Pound: "The Administrative Application of Legal Standards", 44 *American Bar Association Reports*, p. 462.

There are, however, a number of questions which call for serious consideration if administrative law is to develop with advantage and safety, and certain principles need to be followed if the constitutional system of English government is to proceed on an intelligible plan.

The first matter to which I would draw attention is the lack of principle which has been manifested by Parliament in naming the appellate body to which a citizen must go for redress. There is no clear distinction drawn between the class of case which is to be decided by the courts of law and that which goes for determination to one of the central departments of Government. In some cases two alternative procedures are provided for the same class of question. Thus, with regard to the making up of private streets at the expense of the owners, if a local authority acts under the Public Health Act, 1875, an appeal lies by the owner to the Minister of Health ; if it acts under the Private Street Works Act, 1892, a dissatisfied owner must appeal to the local Justices of the Peace. In other cases, notably in the Housing Acts and the Public Health Acts, the legislature, in a single statute, has appointed a Government department to be the tribunal under certain sections and the courts of law to be the appellate body under other sections.[1] No clear principle emerges from the existing legislation, which is inconsistent and haphazard.

I venture to suggest that attention might usefully be paid to the following principles in connection

[1] Cf. F. H. C. Wiltshire: "The Appellate Jurisdiction of Central Government Departments", *Journal of Public Administration*, vol. ii. No. 4, October 1924.

with the powers and jurisdiction of Administrative Tribunals.

(1) Where a new policy of social improvement is to be carried out by the central executive or local governing authorities of a kind which involves interference with private rights of property or personal freedom, it is desirable, in the interests of administrative efficiency and social progress, that judicial functions occurring in connection therewith should be dealt with by an Administrative Tribunal. This applies particularly to controversies arising through the obstructive resistance offered by vested interests to the execution of the scheme.

(2) Where it is desired to create new standards rapidly in a hitherto unexplored field, jurisdiction should be given to an Administrative Tribunal. The degree to which the administrative and the judicial enter into issues differs much in different classes of cases; and this fact provides some guidance as to the kind of appeal which should be provided. It varies to some extent according to the degree to which definite standards have been formed by instructed opinion. Thus, in the case of an ordinary nuisance, the standard is so definite that the judicial element predominates; it is less in the ascendant in such cases as the standard of repair to which a private street should conform; and still less on the point whether a cinema should be allowed in a residential district.[1]

(3) Where new or existing standards are to be applied or extended throughout the country, it is desirable to confer power to decide controversies arising in connection therewith on an Administrative

[1] I. G. Gibbon, *Journal of Public Administration*, October 1924.

Tribunal. A greater consistency of treatment and co-ordination of results is to be anticipated from a single central tribunal than from a group of courts whose decisions are not co-ordinated in an organised fashion on questions of fact. Where it is desired that allowance should be made for local custom and variations in the standard of living in different areas, it is better to let the matter go to the courts of law.

(4) Where the correctness of the decision must depend to an appreciable extent on special knowledge, or information of a kind likely to be available only within the precincts of a Government department, an Administrative Tribunal should be set up either within that department, or with access to the departmental archives, to deal with the matter in preference to the courts.

(5) Although administrative justice is generally cheaper and more rapid than the ordinary judicial process, and while those advantages may be of no small importance in certain fields, the need for cheapness and speed are not in themselves sufficient to justify the supersession of the courts of law by Administrative Tribunals. Much could be done to make the ordinary business of litigation more rapid and less expensive to the parties than it is at present, and it is preferable that the courts of law should be improved in these respects rather than that judicial functions should be conferred on administrative bodies merely in order to attain those ends.

(6) Administrative law may sometimes deal with controversies of a type already dealt with by the ordinary courts of law; but as a general rule it

should be confined to affairs which are beyond the frontiers of the existing body of law. Administrative Tribunals should normally be concerned only with matters in which the State has intervened in some way or other, either by way of regulation or the provision of a service. Hence, in most controversies to be decided by such tribunals at least one of the parties will usually be a public authority. Disputes between subject and subject should usually go to the courts of law in the ordinary way.

(7) Where an administrative body is given judicial functions it should have power to act as the tribunal of first instance. If it is only permitted to hear appeals, and is unable to exercise control over the case in its early stages, it may be impossible to safeguard the ends of justice. Under the National Health Insurance scheme, the original Commissioners (and now the Minister of Health) were empowered to hear claims for benefit made by insured contributors against the approved societies of which they are members, only by way of appeal *after* the case has been decided in the first instance in accordance with the rules of the particular approved society concerned. Parliament intended, in making the Commissioners the final court in these questions, to leave to the approved societies the right to act as courts of first instance, while reserving to the insured person a right of appeal which would not involve him in the expense incidental to proceedings in a court of law. But it has been found that insured persons have great difficulty in getting proper information as to their rights of appeal, greater difficulty in finding the money required to prosecute an appeal, and still more difficulty in

getting a fair hearing before the tribunal of first instance—that is, the approved society.

Although nearly 800 approved societies out of 1000 have adopted the Ministry's model rules and procedure in this direction, and thereby acquired a measure of uniformity, there remains a bewildering diversity of practice among some of the most important societies in regard to such matters as the time limit for lodging an appeal, the number of tribunals through which a case must be taken before an appeal lies to the Ministry, the amount of deposit which must be paid by a complainant, and the constitution of the tribunal. In some societies there are three successive tribunals through which a case must pass before it reaches finality, even as regards the society; and at each stage there are varying conditions as to the time limit, deposit required, and other questions of procedure.

The result of all this is that although the system of legal referees, appointed by the Minister of Health to hear appeals, works well in practice,[1] a very large number of cases which ought to reach the Ministry in its capacity as a Court of Appeal fail in practice to get there.[2] This would be remedied if the Administrative Tribunal in question had some control over the case in its early stages; above all, if the case came before the Minister for its first hearing, and not by way of appeal against a decision of the Domestic Tribunal.

[1] Cf. Evidence of Sir Walter Kinnear before Royal Commission on National Health Insurance, Q. 454 and Q. 23,750, p. 1155.

[2] The total number of appeals in disputes between an insured contributor and his society heard by the Minister of Health in the four years from 1921–24 was only 105, made up as follows: 1921, 22; 1922, 21; 1923, 31; 1924, 31; *ibid.* Q. 501.

It may be convenient if I recapitulate shortly the other recommendations of a practical nature which I have made during the course of the last two chapters.

(8) Administrative justice should in all cases be carried on by definite tribunals consisting of public servants specially nominated for the purpose by the responsible Minister. In no circumstances should judicial functions be left to remain in hotchpotch with the ordinary executive duties of a central department.

(9) Such tribunals should invariably give an aggrieved party the right to an oral hearing if he desires to have one. The hearing should as a general rule be open to the public, and if possible take place in special rooms set aside for the purpose.

(10) Administrative Tribunals should have power to call for documents and compel the attendance of witnesses; and where an oral hearing is asked for, the evidence should be given in person rather than in writing.

(11) Administrative Tribunals should in all cases be required to give reasoned grounds for their decisions, to enunciate as far as possible the principles which they are following, and to publish reports of their decisions.

(12) Great attention should be paid to the quality of the personnel of Administrative Tribunals. The organs of administrative justice may require to be manned by a new type of adjudicator who will combine a knowledge of law with a thorough training in economics and the social sciences. The psychological requisites for the formation of good judgment call for separate consideration, however, and the

traditions of the English judiciary provide a valuable object-lesson in this respect.

(13) Where interference with existing rights of person or property, of a kind likely to arouse powerful antagonism, is contemplated by a Government department, the authority of an Administrative Tribunal set up to adjudicate in disputes arising therefrom should be strengthened by an infusion of independent or representative members from outside. Representation on the tribunal of the interests affected is specially necessary where (*a*) a voluntary submission to its jurisdiction is desirable or (*b*) the effective enforcement of its specific decision is impossible without the co-operation of the parties concerned.

(14) The person or persons who enquire into the facts should, in every case, also decide the issue. The disintegration of the judicial function among several individuals in a single department, or among several committees or groups, which sometimes occurs at present, is highly undesirable and unscientific. The maintenance of the necessary unity in this connection is not incompatible with the utilisation and pooling of official knowledge gathered by a department from various sources.

(15) The principles which it is desired that an Administrative Tribunal should apply, or the policy it should follow, should in all cases be definitely formulated and publicly declared in a Letter of Reference from the responsible Minister to the members of the tribunal. The control exerted by the Minister over the work of the tribunal should, moreover, be exclusively confined to instructions contained in public documents of this kind.

(16) In all cases where the subject-matter of the dispute is important, a right of appeal should normally lie to a superior Administrative Appeal Tribunal, whose decision should be final.

(17) It is desirable that the members of Administrative Tribunals should be personally liable for damages in the courts of law wherever malice or negligence or corruption or fraud could be proved against them in their official capacity. It would therefore be a good thing if the tendency to limit the application of the principle of judicial immunity to members of formal courts of law were preserved and strengthened.

(18) Administrative Tribunals should in all cases be required to exercise a judicial discretion, in the special sense in which that term has come to be understood. Where proof is given that the tribunal has not decided a case with an open mind, or has attempted to further unauthorised purposes, or has been influenced by sinister motives or extraneous considerations, its decision should be open to review by the courts of law, and liable to be quashed (the burden of proof in all cases lying on the party alleging a lack of judicial discretion). With this exception, the system of Administrative Tribunals should remain independent of the courts of law and their determinations be free from liability to review, save on purely technical grounds such as lack of jurisdiction or want of "natural justice".

(19) Domestic Tribunals should definitely be made liable to control by the courts of law. The present practice, whereby they are only called upon to fulfil the requirements of "natural justice", scrutinises the shadow but leaves the substance of

the decision untouched. Frequent and serious injustice results from this situation. The only chance of a real improvement would be if the decisions of such bodies were in all cases made subject to review by the courts, on questions of fact as well as questions of law.

CONCLUSION

Beyond these tentative recommendations I do not propose to go. What the future holds for the development of administrative law in England it is impossible to predict, save that a considerable extension of its scope and power is almost certain to be brought about in the near future. The age in which we live is pregnant with social unrest, and the air is burdened with the note of economic conflict. At a time when the very foundations of civilised society are being questioned, when rapidly changing ideas are shifting the allegiance of men and women from traditional conceptions and established institutions in every department of life—political, international, domestic, economic, religious, scientific, artistic—it would be strange indeed if the law had gone unscathed. Nor has it escaped, as the facts which I have surveyed in the foregoing pages bear witness.

The particular aspects of change with which I have here been concerned are only a part of greater changes which have either already taken place, or are likely to take place in the near future, in the legal and constitutional framework of Great Britain. But they are extraordinarily significant. They betoken a loosening of the rigid system of inflexible

private rights, enforceable in the courts of law almost regardless of social consequences, which for centuries had been gradually consolidating. If, as Professor Laski[1] has convincingly demonstrated, the day of the omnicompetent sovereign state is at an end, and the absolute power which was claimed for it become converted into a limited authority conditional upon the moral adequacy and practical success of its efforts, no less certain is it that the absolute validity and legal sovereignty of individual rights is also passing away. That, indeed, is the essential meaning of the body of administrative law whose development I have traced in the preceding pages. Absolute rights of property and contract, of individual activity and personal freedom, enforceable in the courts of law regardless of urgent social needs, have given way to qualified rights conditional on the extent to which they are compatible with the common good, as interpreted by administrative authorities exercising judicial power.

That power may in practice be exercised wisely or unwisely. The results may be good or bad. But there is an immense change in social outlook, no less than in constitutional development, underlying the pedestrian legislative enactments which I have described and discussed in detail. In no country in the world is the traditional veneration for customary methods and conventional channels of legal procedure stronger than in England. In no country does the judiciary stand in such high public esteem. The definite breakaway from the normal methods and machinery of the law which has taken place during the past half-century is

[1] H. J. Laski: *Grammar of Politics.*

accordingly all the more significant of deep-rooted and fundamental change.

The judicial power which has been given to administrative bodies will, I believe, be exercised wisely, and the results are likely to be good. After surveying the facts with all the care and thoroughness in my power, I am convinced that Administrative Tribunals have accomplished, and are accomplishing, ends which are beyond the competence of our courts of law as at present constituted. Furthermore, those ends seem to me socially desirable ones which compare favourably with the selfish individual claims based on absolute legal rights to which the formal courts are so often compelled to lend ear. I believe that administrative law as it has developed in modern England is filling an urgent social need which is not met by any other branch of the law; and that there is no inherent reason, if due care and foresight are exercised, why it should be unfitted to take its place side by side with the common law and equity and statute law in the constitutional firmament of the English governmental system. I believe that administrative justice may become as well-founded and broad-based as any other kind of justice now known to us and embodied in human institutions.

In these pages, however, my object has been to describe and explain its growth and evolution, to understand the causes rather than either to condemn or praise; to suggest methods of improvement rather than to discover reasons for opposition. Administrative justice, I maintain, can no longer be regarded as a foundling child to be avoided and pushed into the street at the first suitable oppor-

tunity. It must be accepted as a recognised part of the law. The ultimate purpose of all law is the welfare of society; and for a long time to come Administrative Tribunals will undoubtedly be the most effective method of securing the welfare of the nation in certain departments of life.

But it is highly desirable that we should be fully conscious of the whole problem which is presented by the rise of administrative justice in England, properly critical of its defects, and awake to its possible dangers. It is my hope that some of those defects may be remedied, and the dangers avoided, by the recommendations of a practical character which I have ventured to make and which are recapitulated briefly in this chapter.

The aim of a sound body of administrative law should be neither to disappoint the reasonable expectations of the possessor of private rights, nor to cripple the free activities of the individual, nor yet again to enable executive tyranny to masquerade under a colourable imitation of judicial sanction. Its aim should rather be to provide effective guarantees that the powers of the State will be wisely exercised in the public interest unfettered by private selfishness, to hold the balance between the claims of extreme autocracy on the one hand and extreme legalism on the other.

Whether that task is successfully accomplished will depend in the last resort less on the institutional framework and the statutory power with which Administrative Tribunals are endowed than on certain psychological considerations to which I have referred in an earlier chapter. Justice cannot be assured by any known device of organisation or

legislative formula. It requires for its enthronement the services of men possessing certain inherent qualities, who are capable of scientifically investigating objective facts, and of creating and applying ethical standards in the social interest. That is a rare combination of human qualities; but just men have always been rare. The sense of fairness is at bottom an innate personal quality; and there is no formula by which it can be produced.

All we can say is that what may broadly be called the sense of justice appears to be on the increase in many departments of life. In all the fields in which men are extending the frontiers of knowledge, something is being done to develop the judicial mind. No one can be a good biologist, or competent as an engineer, as a bacteriologist, as a research chemist, as an economist, as a scientist of any kind, without being imbued with a sense of fairness, without possessing, in regard to the subject-matter of his own work at least, some measure of the judicial mind. The modern conception of international comity and economic or social democracy involves, again, in various spheres, the exercise of discretions which shall be "judicial" or "reasonable", of power which is not to depend on caprice or personal favour or self-interest. Here once more we have the rudiments of the judicial method of thought. The old waywardness is disappearing; and though with it we may also lose certain qualities of spontaneity and impulsiveness which are precious, we shall gain a nearer approximation to justice among men than has prevailed in the past.

We can, then, look forward to a world in which the ideal of social justice will become increasingly

prominent, in which the ability to form an intelligent judgment on men and affairs, and on the phenomena of mind and matter, will become more widespread. Since in such a world judicial habits of mind are likely to grow more and more prevalent in many departments of life, we can surely have reason to believe that the new era of administrative law which the twentieth century has ushered in is not likely to set at nought the fundamental ideas of justice on which the harmonious development of organised society depends.

INDEX OF NAMES OF AUTHORS AND OTHER PERSONS

Abbott, C.J., 19
Adler, H. M., 239 *n.*
Alverstone, Lord, 9, 222
Amos, Sir M , 75
Anson, Sir W. R., 198 *n* , 239 *n.*
Archbold, I. F., 20
Atkin, L J., 61, 64

Bacon, Francis, 18, 295
Bent, E., 49
Bentham, Jeremy, 78, 207
Berthélemy, 27 *n.*
Blackburn, J., 59
Blackstone, Sir W., 18
Bowen, L J., 172
Bowley, A. L., 212, 218
Brandeis, J., 269
Brett, L.J , 140
Buckmaster, Lord, 46
Burke, Edmund, 243
Burns, Delisle, 211

Campbell, Lord, 271
Cardozo, B. J., 193, 201, 230, 238, 245, 269
Carr, C. T., 34 *n.*
Channell, J., 52
Chardon, 27 *n.*
Charles, J., 61
Childers, Rt. Hon. Hugh, 268
Cockburn, C.J., 232
Cohen, M. R., 244
Coke, L.C.J., 52, 213
Cowcher, W. B., 231 *n.*
Crompton, J., 50

Davidson, du Bois, 154 *n.*
Dawson, R. M., 44 *n.*, 48 *n.*, 54 *n.*
Dewey, J., 194, 215 *n.*
Dicey, A. V., 15 *n.*, 26, 27, 28, 29, 32 *n.*, 37 *n.*, 55 *n.*, 81, 143 *n.*, 147 *n.*, 189 *n.*, 251 *n.*, 266, 282
Dillon, 238
Dodson, J G., 278
Ducrocq, 27 *n.*
Duguit, L., 55
Duncomb, G., 80 *n.*

Eliot, G., 79
Esmein, A., 27 *n.*
Eve, J., 173

Frankfurter, F., 31
Freund, E., 86 *n.*, 228 *n.*, 300

Gény, F., 215, 217
Ghose, N., 56 *n.*
Gibbon, I. G., 17, 289, 315 *n.*
Gladstone, Lord, 223
Goodnow, F. J., 10 *n.*, 13 *n.*, 17 *n* , 34 *n.*, 91 *n.*, 252 *n.*
Gray, J. C., 69

Haldane, Lord, 144, 145, 186
Halsbury, Lord, 13, 14, 21 *n.*, 42 *n.*, 53, 58 *n.*, 80 *n.*, 96 *n.*, 209 *n.*, 224 *n.*, 229, 231 *n.*, 239 *n.*
Hamilton, A , 220
Harcourt, Sir William, 224
Hariou, 27 *n.*
Henderson, G. C., 63, 74 *n.*, 206, 261 *n.*, 288
Herschell, Lord, 7, 70
Hewart, L.C.J., 30, 181, 309 *n.*
Hill, J., 268
Hobhouse, L. T., 43 *n.*, 195 *n.*, 235 *n.*
Holdsworth, W. S., 15, 16, 52 *n.*, 53

Holmes, O. W., J., 227
Hoover, H., 253, 293

Inderwick, F. A., 15 *n.*

Jacob, G., 14 *n.*, 42 *n.*, 229 *n.*
Jacquelin, 27 *n.*
Jenks, E., 15 *n.*, 40 *n.*, 78 *n.*, 80
Jervis, J., 272 *n.*
Jèze, G., 27 *n.*

Kay, L.J., 50
Keynes, J. M., 85, 212
Kinnear, Sir W., 318 *n.*

Laferrière, 27 *n.*
Laski, H. J., 14 *n.*, 164 *n.*, 282, 323 *n.*
Lippman, W., 219 *n.*, 221, 243
Locke, J., 56
Loreburn, Lord, 141, 145
Lowell, A. L., 30
Lumley, W. G., 64 *n.*, 147 *n.*

MacAlister, Sir D., 246
M'Clintock, H. L., 202, 255, 264 *n.*
Mackenzie, Sir William, 299
MacQuarie, Governor, 49
Madden, J. J., 101
Maitland, F. W., 16 *n.*, 26, 56, 233
Marriott, Sir J. A. R., 13, 30
Mathew, J., 140
Matthews, J. B., 239 *n.*
May, Sir T. E., 44 *n.*, 54 *n.*
Mellor, 6
Mersey, Lord, 155
Moller, W. H., 239 *n.*
Mond, Sir A., 299
Montesquieu, 18
Morgan, J. H., 34
Moulton, Lord, 145, 186, 232

Owen, H., 132 *n.*

Pearson, Karl, 218
Phillips, M., 49
Pillsbury, W. H., 14 *n.*, 158 *n.*, 253 *n.*, 264
Plowden, E., 80
Pollock, Sir F., 37, 61 *n.*, 164, 184 *n.*, 188, 195 *n.*, 200, 282
Pound, Roscoe, 15, 16, 32, 81, 188 *n.*, 212, 251 *n.*, 260, 268, 313

Raulston, J., 245
Roberts, C., 286
Robertson, G. S., 6
Robson, W. A., 110 *n.*, 287 *n.*
Roche, J., 114
Rosenberg, J. N., 84 *n.*
Russell, F., 51 *n.*, 67 *n.*, 75 *n.*, 76 *n.*, 189 *n.*

Schuster, Sir C., 35 *n.*, 186
Scrutton, L.J., 10
Shaw, Lord, of Dunfermline, 146, 291
Short, 6
Simpson, A. H., 21, 221 *n.*
Stamp, Sir J., 11, 191 *n.*, 192, 212
Stroud, F., 42 *n.*

Thomson, J. A., 212
Tomlin, Sir T. E., 41
Troup, Sir E., 18, 24, 62 *n.*, 76, 87 *n.*, 135 *n.*, 190, 208, 224 *n.*
Tudor, O. D., 25 *n.*

Wallace, Sir M., 154 *n.*
Wallas, Graham, 49, 211, 220 *n.*, 225, 312 *n.*
Webb, Sidney, 16, 17, 199
Webb, S. and B., 16, 17, 230 *n.*
Wells, H. G., 220 *n.*
Wheatley, J. H., 286
White, C.J., 84
Whitehead, A. N., 214 *n.*, 217, 220 *n.*
Wiltshire, F. H. C., 265, 314 *n.*
Wolf, A., 219
Woodhouse, Sir James, 154 *n.*

Xenophon, 187

GENERAL INDEX

Acts of Parliament:
6 & 7 Vic c. 73, p. 181
11 & 12 Vic. c. 42, p. 52
17 & 18 Vic c. 31, pp. 92, 95
21 & 22 Vic c. 90, p. 176
24 & 25 Vic. c. 70, pp. 136, 260
31 & 32 Vic. c. 72, p. 59
34 & 35 Vic. c. 31, p. 183
34 & 35 Vic. c 105, p. 135
35 & 36 Vic. c. 33, p. 57
35 & 36 Vic. c. 79, p. 102
36 & 37 Vic c. 48, p. 97
36 & 37 Vic. c. 76, pp. 95, 96, 273
38 & 39 Vic. c. 59, pp. 102, 254, 307, 314
39 & 40 Vic. c. 75, p. 103
45 & 46 Vic c 50, p. 66
51 & 52 Vic. c. 41, pp. 23, 104, 202
52 & 53 Vic. c. 25, p. 97
52 & 53 Vic. c. 57, p. 97
53 & 54 Vic. c. 5, p. 20
53 & 54 Vic. c. 59, p. 23
53 & 54 Vic. c. 70, p 105
54 & 55 Vic. c. 12, p. 97
55 & 56 Vic. c. 44, p. 97
55 & 56 Vic. c. 57, p. 314
56 & 57 Vic. c. 29, p. 97
56 & 57 Vic. c. 61, p. 55
57 & 58 Vic. c. 60, p. 134
57 & 58 Vic. c. 213, p. 107
61 & 62 Vic. c. 29, pp. 136, 260
2 Edw. VII. c. 17, p. 182
7 Edw. VII. c. 28, pp. 151, 153
8 Edw. VII. c. 40, p. 137
9 Edw. VII. c. 44, pp. 62, 80, 105, 307
4 & 5 Geo. V. c. 59, p. 25
8 & 9 Geo. V. c. 40, p. 59
9 & 10 Geo. V. c. 21, p. 116
9 & 10 Geo. V. c. 35, p. 105
9 & 10 Geo. V. c. 50, pp. 136, 260
Acts of Parliament (*contd.*)—
9 & 10 Geo. V. c. 56, p. 181
10 & 11 Geo. V. c. 28, p. 134
10 & 11 Geo. V. c. 30, pp. 126, 130, 254, 270
10 & 11 Geo. V. c. 48, p. 155
10 & 11 Geo. V. c. 72, p. 135
11 & 12 Geo. V. c. 49, p. 138
11 & 12 Geo. V. c. 51, p. 130
11 & 12 Geo. V. c. 55, p. 98
12 & 13 Geo. V c. 42, p. 132
13 & 14 Geo. V. c. 38, p 133
14 & 15 Geo. V. c. 30, pp. 128, 130, 254
14 & 15 Geo. V. c. 34, p. 135
14 & 15 Geo. V. c. 38, pp. 111 *et seq.*, 256, 274
15 & 16 Geo. V. c. 14, pp 105, 256
15 & 16 Geo. V. c. 70, pp. 139, 274
16 & 17 Geo V. c. 51, p 136
17 & 18 Geo. V. c. 22, p 183
Adjudication: distinguished from administration, 188
Administration, public: business of, 5, 55
according to law, 55
development of, 56
distinguished from adjudication, 188
impossible without delegation, 68
liability to review by the courts, 85
Administrative authorities: appeals made against, under Public Health Acts, 314
authority of, 69
compared with judges, 74
desirability of allowing lawyers to appear before, 281
desirability of giving reasons for decision of, 206 *et seq.*
effect of decision by, 47

Administrative authorities (*contd.*)—
exercise powers for social improvement, 261
immunity not extended to, 57
judicial functions of, 23
liability for misuse of authority by, 58
must state reasons for decisions when exercising judicial functions, 208
position as regards evidence, 80
powers in dealing with cases, 82
responsibility of, 55
right to initiate actions, 74
Administrative law: appeals against, 314
bodies concerned in carrying out, in England, 313
characteristics of, 275
dangers of, 298 *et seq.*
growth of, 32, 250 *et seq.*
in England, 26
in France, meaning of, 27
its aim, 325
proposed principles which should be followed, 316
regulation of, 306
revival of, 249
America, Supreme Court of, 82
America, United States of: Administrative Tribunals cheaper to the litigant, 264
development of administrative law, 253, 261
division of powers in, 10.
erection of Administrative Tribunals in, 255, 300
Mr. Hoover on the Federal government, 253
Antiquities: public purchase of, 3
Appeals: against administrative authorities, 314
against approved societies, 317
Approved societies: appeals against decisions of, 317
disputes in, 115
powers of Minister of Health over, 115
Arbitrators: must decide according to law, 188
immunity of, 50, 57
Assize: duties of judges on, 17
Attorney-General: duty regarding patents, 153
Awards to Inventors, Royal Commission on. *See* Inventors

Ballot Act (1872), 57
Board of Guardians. *See* Guardians
Board of Inland Revenue. *See* Inland Revenue
Board of Trade. *See* Trade
British Medical Association, 120
British Museum, the: antiquities purchased with public money, 3
Business, judicial. *See* Judicial business

Central Midwives' Board: constitution and powers, 182
Charities: powers of Charity Commissioners in regard to, 25
Charity Commissioners: as administrators, 25
as judges, 25
established to protect charitable property, 24
power to enquire into charities, 25
Classification: advantages and disadvantages, 220
essence of, 219
method of, 219
process of, 219
Clerk of the Peace: appointment of, 45
position of, 45
Coal Industry, Royal Commission on, 276 *n.*
Constitutional Law, 12
Contempt of Court, 54
Copyright: refused to books deemed immoral, 241
Coroner: performance of judicial functions by, 19
work of, 19
County Councillor: immunity of, 27
County Councils, 22
County Police: control of, 23
Court: Common Law Courts derived from the King's Council, 15
King's Court, as the dominant governing authority in England, 14
decision of, on questions of law, 83
derivation of the word, 42

Court of Chancery: jurisdiction of, 37
equitable jurisdiction hardened into doctrines, 260
shifting of the living law to, 15
Court of justice: proceedings must be public, 76
Court of law: decision is final, 82
dependent on the evidence for the facts, 268
distinguished from unofficial tribunals, 73
formation of, 43
rights of self-regulation possessed by, 279
rigour of procedure, 279
Court of Referees for Unemployment Insurance: composition of, 126, 270
powers concerning unemployment benefit claims, 127, 264
weakness of, 280
Court of Requests, 15
Courts-martial: immunity extended to, 50
Crown: powers must be exercised in accordance with the ordinary common law, 28
freedom from liability, 55
Curia. *See* Court

Decisions, judicial: defined, 41
distinguished from an administrative order, 16
distinguished from a legislative resolution, 16
influenced by tenure of office, 46
require to be supported by evidence, 78
Defence of the Realm, Royal Commission. *See* War Compensation Court
Delegation: process of, 68
Discretion: element of, 7
conditions imposed on the exercise of, 231 *et seq.*
defined, 229 *et seq.*
development of, when extended to public authorities, 235
executive, 282
judicial, 228
methods of translating into judicial standards, 282
Disputes: industrial, settlement of, in America, 297
technical knowledge needed for adjudication of, 296
Distribution of Power. *See* Power
District Auditor: an Administrative Tribunal, 110
appointment of, 109, 286
powers and duties of, 109 *et seq.*
required to state reasons for decisions, 209
District Councils: setting up of, 22
Droit administratif, 27

Economic Science, 300
Education, Board of: judicial functions of, 130 *et seq.*
jurisdiction of, 132 *et seq.*
powers of, 130, 142
Education Act (1921), 130 *n.*, 131 *n.*
Education (Institution Children) Act (1923)
Elections: duties of Presiding Officer at, 57
the Returning Officer, 19
Equality before the law, 195
not confined to judicial proceedings, 199
tradition of, founded in the law courts, 200
Evidence: amount necessary to support a decision, 74
judge's decision must be in accordance with, 77
taking of, explained, 74
Executive: the hegemony of, explained, 33
rights of, 34
powers of, 83

Factories: overtime in, 3
Federal Trade Commission of America: defined and discussed, 206
an Administrative Tribunal, 206
Foreign Office, the: issue of passports, 81, 87
France: *droit administratif* in, 27
Functions, judicial. *See* Judicial functions

Gas Regulation Act (1920), 134
General Medical Council. *See* Medical Council

Government: basis of, 2
functions of, 3, 5, 12, 18
independence of Colonial, 32, 49
in England, 13
Guardians of the Poor. superannuation grants, determining of, 6

Health, Local Boards of: establishment of, 22
Health, Minister of: as an appellate body, 103, 105
appoints the District Auditors, 109
bound to avail himself of his powers under Housing Acts, 232
constitution of tribunals in regard to complaints against panel doctors, 269
decisions as to liability to Health Insurance, 112
decisions, means of arriving at, 113
decision of appeals under Public Health Acts, 270
hearing of appeals regarding complaints against practitioners, 289
judicial decisions of, 140, 280
judicial functions of, 101 *et seq.*, 111, 113, 125
jurisdiction under Housing Acts, 307
Local Government Board, duty regarded as judicial, 101
powers over housing duties, 106
powers over medical practitioners, 119
powers over medical treatment of insured persons, 117
powers under National Health Insurance Act, 111
powers under Local Government Act, 202
powers under Public Health Acts, 307
procedure not necessarily judicial, 146
procedure of appeals against decisions of, 106, 115
responsibility to Parliament, 145
right of appeal against decision of, 105 *et seq.*, 112
settlement of National Health Insurance claims, 115
Health, public. *See* Public Health
High Court, the: jurisdiction of, 72
Highway Authorities: establishment of, 22
Home Office: in the position of a final Court of Criminal Appeal, 24
powers of reprieve, 190
responsible for Albert Medal Awards, 190
Home Secretary: duty, of reviewing criminal cases, as the final Court of Appeal, 76
Housing: powers of Minister of Health to decide questions concerning, 106
Housing and Town Planning Act: condition of working class houses, 105
Ministry of Health an appellate body under, 105
powers of local authorities under, 105
procedure of appeals, 106

Immunity against legal action: extended to an arbitrator, 50
extended to courts-martial, 50
extended to justices of the peace, 50
for judicial acts, 52 *n.*
of a county councillor, 57
of the judge, 50 *et seq.*, 58
Impartiality: conditions necessary to ensure, 43
judicial, defined, 66
difficult to maintain, 287
Imponderables: exclusion of, 220
Income Tax, Commissioners of: decisions final, only on questions of fact, 91
may not decide own cases, 59
Indemnity Act (1920), 155 *n.*
Industrial Revolution: effect of, 22, 92
Inland Revenue, Board of: powers of, to impose a fine for non-stamped documents, 191
Inns of Court: jurisdiction exercised over barristers, 181
Insurance Officer: defined, 128
powers over unemployment benefit claims, 128
Inventors: Royal Commission on Awards to, 150 *et seq.*, 208

Judges: administrative functions of, 19, 237
appointment of, 46
decisions of, 45, 59
must contain an element of certainty, 201
disqualifications, 60
distinguished from administrators, 67, 74
functions, 75, 85
J. B. Cardozo on, 230, 245
immunity of, from legal liability, 50, 57, 306
impartiality of, described, 244
independence of, 43, 47, 58
in New South Wales, 49
influence of ethical considerations on, 240
integrity of, 58 *et seq.*, 61
must act personally, 67
must decide according to law, 188
must possess certain conceptions, 241
must possess a policy, 233
necessity of evidence for decision, 77, 80
power over ward of court, 20
powers to mitigate the penalty in cases of murder, 223
qualifications, Blackburn, J, on, 59
salary of, 44
security of tenure, 48
tenure of office, 44, 46, 67
Judicature. *See* Judiciary
Judicial acts: distinguished from administrative, 17
defined, 16
examples of, 7
immunity for, 53 *n.*
Judicial authorities: appointment of, 46
disqualified by financial interest, 65
Judicial business: distinguished from administrative, 17
Judicial decisions. *See* Decisions, judicial
Judicial functions: acquisition by the executive denounced, 34
characteristics of, 12, 67, 71, 74, 81.
completeness of, 18
Judicial functions (*contd.*)—
conferred on large departments, 273
discharge of, special tribunals should be nominated in certain cases, 294
distinguished from administrative, 5, 12, 16, 21
essence of, 73
essentials for proper performance, 85, 293
of government departments, classified, 6
identified, 5, 41, 42
performance of, by coroner, 19
exemplified, 70, 85
should be subject to review, 304
test of, 69
Judicial mind: its accomplishments, 37
an important element in the judicial process, 37
development of, 247
sense of relevance essential to, 197
Judicial proceedings, 82
classifying process, illustrated by, 216
defined, 40, 241
Judicial process: characteristics of, 76
defined, 186
effect when set in motion, 74
element of judicial mind in, 37
outward features of, 88
Judicial review: the right to, 86
Judiciary: work of, 5, 34
independence of, 43, 48
immunity from criticism, 54
as part of the public service of the Crown, 44
Jurisdiction: exercise of, 56
as exercised by the Lord High Chancellor, 37
over lunatics, 20
Juror: duty to declare his knowledge, 80
Jury: position as regards evidence, 80
Justice: administration of, 213, 294
characteristics of, 53
must be certain, 200
requirements of, 185, 238, 245
demand for new type of, 32
establishment of, 43
in the courts, 41 *et seq.*

Justice, administrative: advantages of, 306
limitations of, 298 *et seq.*
proposed principles of procedure, 319
Justice, court of *See* Court of justice
Justices' Court of Sessions, 16
Justice of the Peace: classification of duties, 16
duties of, 16, 230
subject to review, 91
functions of, 56
immunity extended to, 50
local government administered by, 52
jurisdiction in licensing cases, 64
must decide according to law, 188
non-judicial action exemplified, 70
protection of, 52 *n.*
rise of, 16, 56
work now mainly judicial, 22

King's Bench: control of administration of, 17
judicial duties of justices, subject to review by, 91
King's Council: an administrative body, 15
transference of judicial powers to, 15

Labour, Minister of: duties, 7
system of Unemployment Insurance administered by, 125
Law Officers: decision of appeals for patents, 153
not a court, 150
Law, Reign of. *See* Reign of Law
Law Society: admission to, how granted, 180
Law-making: business of, 5
Legislation: business of, 5
social, recent developments in, 90
Licences: issue of, by L.C.C., 62
Licensing Justices: duty of, 64
refusal of certificates when not an exercise of discretion, 231
Liquor Licence: issue of, 23
opposition to the grant of, 8
Lord Herschell on, 8
Lis inter partes: analysis of, 69 *et seq.*
conception of, 72
Lord Herschell on, 70

Litigant: rights of, 75
Local Authorities: powers over landlord, 105
Local Boards of Health. *See* Health
Local Government: development in England, 22
administration of, 230
by justices of the peace, 52
increase of control over, effects of, 30
powers of Ministry of Health under statute, 202
Local Government, Royal Commission on, 277 *n.*
Local Government Board. *See* Health, Minister of
Locomotives Act (1862), 136 *n.*
(1897), 136 *n.*
(1898), 260 *n.*
London Building Tribunal, the, 107
London County Council: issue of licences by, 62
London Stock Exchange: jurisdiction over members, 177
London Traffic Act (1924), 135
Lord High Chancellor of England: as a judge, 19
as a member of the Cabinet, 20
as the chief legal adviser to the Government, 20
as head of formal judicial system, 20
appoints County Court judges, 20
cannot receive assistance in his judicial capacity, 67
jurisdiction exercised by, 37
Lunacy Act (1890), 20 *n.*
Lunatics: jurisdiction over, 20
powers of a High Court judge over, 20

Machinery of Government Committee: report of, 20 *n.*
Medical Council, the General: criticised as a judicial body, 246
exercise of judicial functions by, 246
position as declared by Court of Appeal, 184
powers of removing doctors from registers, 310

Merchant Shipping Act (1894), 62
controversies under decided by Marine Superintendents, 270
powers of Board of Trade under, 133
Midwives' Act (1902): appeals under, 182
Ministry of Health. *See* Health
Ministry of Labour. *See* Labour
Ministry of Transport. *See* Transport
Municipal boroughs: reform of, 22
Municipal Corporations Act (1882), 66

National Health Insurance Act (1924), 116 *n.*
approved societies recognised under, 204
lack of confidence in, due to procedural defects, 279
settlement of disputes, by Minister of Health, 115, 117
Royal Commission on, 114 *n.*, 116 *n.*, 120 *n.*, 204 *n.*, 258 *n.*, 265 *n.*, 280 *n.*, 292 *n.*
functions, 284
judicial powers, 283
position in relation to Treasury, 284
National Health Insurance, Medical Benefit Regulations, 118 *n.*
Natural justice: principles of, 149, 169

Oaths: judicial, 59
Official Receivers: meaning of, 25
Officials: appointment of administrative, 46
right to initiate action, 74
Old Age Pensions Act (1908), 137*n.*
Oral hearing: important as a method of establishing facts, 280
Organisations, vocational, 176 *et seq.*

Pardon, conditional, 24
Pardon, free: as a means of rectifying injustice, 24
Parish Councils, 23
Passport: issue by Foreign Office, 81, 87
Passport: evidence required for issue of, 81
Patent agents: must register as such, 177
Patent and Designs Act, (1907), 151 *n.*, 153 *n.*
Patent Office: effect of establishment of, 153
Peace, Justice of. *See* Justice of the Peace
Penal servitude: substitution for capital punishment, 24
Pensions schemes: tribunals for deciding claims, 137
constitution of Appeal Tribunals, 138
Political interference with judicial decisions, 282 *et seq.*
Poor, Guardians of. *See* Guardians of the Poor
Power to enforce: not an essential of the judicial function, 83
Powers: sovereign power, conception of, 13
distribution of, 1, 2
separation of, 12
doctrine of, 13
Press: criticism of judicial process permissible in, 54
Privilege, absolute: doctrine of, in relation to judicial functions, 52
Privy Council, 17
Promissory Oaths Act (1868), 59
Provisional Orders, 278
Public administration, 68, 266
Public Authorities Protection Act (1893), 55
Public Health: powers given to Sanitary Authorities, 102
Minister of, powers, 307
See also Health, Minister of
Public officers: must be free from bias, 65
Public policy: defined, 240
influence on legal doctrine, 238
Public services: liabilities of an administrator of, 45
Public welfare, 2
Publicity: lack of, a disadvantage of Administrative Tribunals, 276
Punishment, capital penal servitude substituted for, 24

Quarter Sessions, Court of: judicial duties of justices subject to review by, 91

Railway and Canal Commission: features of, 91 *et seq.*
Railway and canal traffic regulation (1854), 92, 95
jurisdiction transferred to commissioners, 273
provision for complaints against railway companies, 270
Railway Companies Amalgamation (1872). appointment and duties of commissioners, 95
form of procedure, 95
report, 94
Railway Courts, 92 *et seq.*
Railway Rates Tribunal, 99 *et seq.*
Railways Acts (1921), 98
Referees, Court of. *See* Court of Referees
"Reign of Law": defined, 2
doctrine of, 35
Returning Officer: a parliamentary official, 19
not a judicial officer, 19
Right to be heard, the, 74 *et seq.*
Rivers Pollution Act: Ministry of Health an appellate body under, 103
Roads Act (1920), 135
Royal prerogative of mercy: exercise of, Lord Gladstone on, 223
Sir Wm. Harcourt on, 224
powers, 190

Sanitary authorities: powers under the Public Health Act, 102
School Teachers (Superannuation) Act (1922), 132 *n.*
Science: discussed, 212
founded upon reason, 213
Karl Pearson on scientific method, 218
Sheriff: gradual acquirement of judicial duties, 18
Solicitor-General: duties regarding patents, 153
Solicitors: admission to Law Society, how granted, 180
effects of complaints against, 180
rights of appeal, 181
Star Chamber, 52
shifting of the living law to, 15
notorious tyranny in, 17
Statistics: defined by Prof. A. L. Bowley, 212

Tenure of office. effect on mental processes, 46
Trade, Board of: administration of Gas Regulation Act, 134
judicial functions, 133
powers under Merchant Shipping Acts, 133
Trade Unions: expulsion of members, 182
powers of, 310
Transport, Minister of: judicial functions, 135
powers over licensing appeals, 135
London traffic appeals, 135
Treasury, Board of: position in relation to Insurance Commissioners, 284
Trial: conduct of, 75
Tribunals: appearance in the English Constitution, 31
distinguished from courts of law, 73
failure to reveal principles underlying their decisions, 205
Tribunals, Administrative, 90 *et seq.*
advantages of, 262 *et seq.*, 279
alleged incapability to act impartially examined, 282
criticised, 245
disadvantages of, 275 *et seq.*
distinguished from bodies of judicial commissioners, 91
distinguished from Domestic Tribunals, 312
growth of, in United States, 72, 228
failure to provide quick methods of adjudication, 265
failure to enunciate clearly, 204
formation of, 261
not liable to political interference (more than courts of law), 283
personnel of, 295
powers to enforce a policy, 275
procedure of, 144, 265
proposed principles concerning powers and jurisdiction, 314

Tribunals, Administrative (*contd.*)—
reasons for establishment of, 235
regulation of, 304 *et seq.*
right to an oral hearing before, 208
rulings, Mr. J. Holmes on, 227
should be required to give reasons for decisions, 210
specific judicial power conferred upon by the State, 301
structure of, 288 *et seq.*
work of, 302, 305
Tribunals, Domestic: attitude of courts of law towards, 167
authority of, 184
conditions of proceedings in, 172
control over, 310 *et seq.*
criticism of, 245
decisions of, Sir F. Pollock on, 183
should be subject to review, 175, 178, 184, 312
defects and disadvantages, 296
disinclination to enunciate clearly, 204
distinguished from Administrative Tribunals, 312
must act within their jurisdiction, 172
powers of, 310
vocational organisations, 176 *et seq.*
voluntary associations, 161 *et seq.*

Umpire's Court: weakness of, 280
Unemployment Benefits: claims to, 126
conditions required to be fulfilled for, 129
Unemployment Insurance: administered by the Minister of Labour, 125
claims for benefit, 126
Unemployment Insurance (*contd.*)—
right of appeal against, 126
tribunals, 125
powers of the Umpire concerning claims, 126
Umpire defined, 129
United States. *See* America

Vivisection, 3
Voluntary associations, 161 *et seq.*
activities, 164
characteristics, 165
conception of, 163
judicial functions performed by, 164
legal status, 162
objects, 161
organs of justice, 166
powers, 165

War Compensation Court: does not publish reasons for its awards, 208
duties and definition, 154
formerly Defence of the Realm Losses Royal Commission, 154
Wards of court: authority of court over marriage, 21
decision of court as regards religion, 21
education and upbringing in, 21
jurisdiction and powers of a judge in dealing with, 20
War Pensions Act (1921), 138 *n.*
Western civilisation: growth of, 2
Widows', Orphans' and Old Age Contributory Pensions Act (1915), 139, 274
claims to be made to Minister of Health, 139
Working Classes: housing of, 105

TABLE OF CASES

PAGE

Ackers *v.* Howard (1886), 16 Q.B.D. 739; 55 L.J., Q.B. 233; 4 O'M. and H. 65 19
Adams *v.* Tanner (1916), 244 U.S. 590 269
Allbutt *v.* General Council of Medical Education (1889), 23 Q.B.D. 400; 61 L.T. 585; 37 W.R. 771 176
Anderson *v.* Gorrie (1895), 1 Q.B. 668; 14 R. 79; 71 L.T. 382—C.A. 50
Ashby *v.* White (1703), 2 Ld. Raymond 938; 3 Id. 320; 1 Smith L.C. 10th edn. 231 58
Attorney-General *v.* Edison Telephone Co. (1880), 50 L J., Q.B. 145; 6 Q.B.D. 244; 43 L.T. 697 216
Attwood *v.* Lamont (1920), 3 K.B. 571; 65 S.J. 25; 36 T.L.R 895 . 239

The Banshee (1887), 57 L.T. 841; 6 Asp. M.C. 221 268
In re Beard (1908), Revisionary and Gen. Securities Co. *v.* Hall (1908), 1 Ch. 383; 77 L.J., Ch. 265 239
Beaumont *v.* Reeve (1846), 8 Q.B. 483; 15 L.J., Q.B. 141; 10 Jur. 284 239
Begbie *v.* Phosphate Sewage Co. (1875), L.R 10, Q.B. 491; 35 L.T. 350; 25 W R. 85—C.A. 239
Bile Bean Mfg. Co. *v.* Davidson (1906), 8 F. 1181—Ct. of Sess. . 239
Board of Education *v.* Rice (1911), A.C. 179; 80 L.J., K.B. 796; 104 L.T. 689; 9 L.G.R. 652 . . . . . 53, 141, 148
Bottomley *v.* Brougham (1908), 1 K.B. 584; 99 L.T. 111; 24 T.L.R. 262; 77 L J., K B. 311 . . . . . 51, 52
Boulter *v.* Kent Justices (1897), A.C., at p. 569; 66 L.J., Q.B. 787; 77 L.T. 288 . . . . . 8, 70
Bourne *v.* Keane (1919), A.C 815; 89 L.J , Ch. 17; 121 L.T 426; 35 T.L.R. 560 239
Bowman *v.* Secular Soc. (1917), A.C. 406; 86 L.J., Ch. 568; 117 L.T. 161; 33 T.L.R. 376 240
Brookes *v.* Earl of Rivers, Hardres Rep. of Exchequer, p. 503. . 60
Burr *v.* Smith (1909), 2 K.B. 306; 78 L.J., K.B. 889; 101 L.T. 196; 25 T.L.R. 542 51
Ld. Byron *v.* Dugdale (1823), 25 R.R. 282 241

Capel *v.* Child (1832), 2 C. and J. 558; 2 Tyr. 689; 1 L.J., Ex. 205 . 169
Cassel *v.* Inglis (1916), 2 Ch. 211; 85 L.J., Ch. 569; 114 L.T. 935; 32 T.L.R. 555 . . . . . 178, 229
Chicago B. and Q. Railway Co. *v.* Babcock (1907), 204 U.S. 585 . 228
In re Coalport China Comp. (1895), 2 Ch. 404; 64 L.J., Ch. 710; 12 B. 462; 73 L.T. 46. 176

PAGE

Consolidated Exploration Co. *v.* Musgrave (1900), 1 Ch. 37; 69 L J., Ch. 11; 81 L.T. 747 239
Crocker *v.* Plymouth Corp. (1906), 1 K.B. 494; 75 L.J., K.B. 375; 94 L.T. 734; 22 T.L.R. 336 . . . . 131, 133, 222
Cullen *v.* Morris (1819), 2 Stark, 577; 20 R.R. 742 19
Auditor Curle's Case, Cok. Rep. xi. p. 3 82

Dann *v.* Curzon (1911), 104 L.T. 66; 55 S.J. 189; 27 T.L.R. 163 . 239
Day *v.* Savage, Hob , at p. 87 61
De Verteuil *v.* Knaggs (1918), 87 L.J., P.C. 128; A.C. 557; 118 L.T. 738; 34 T.L.R. 325 150
De Windt *v.* De Windt, (1854), 23 L.J., Ch. 776; 2 Eq.R. 1007; 2 W.R. 648 239
Dodd *v.* Francisco, 38 N.J. Law, 490; 53 Atl. 219 . . . 71

Eccles *v.* Wirral Rural Sanitary Authority (1886), 17 Q.B.D. 107; 55 L.J., M.C. 106; 34 W.R. 412 141
Everett *v.* Griffiths (1921), 1 A.C. 631; 90 L.J., K.B. 737; 125 L.T. 230; 37 T.L.R. 481 . . . . . 53, 148

F. *v.* F. (1902), 1 Ch. 688; 71 L.J., Ch. 415 21
Fisher *v.* Jackson (1891), 2 Ch. 84; 60 L.J., Ch. 482 . . . 17
Fisher *v.* Keane (1878), 11 Ch.D. 353; 49 L.J., Ch. 11; 41 L.T. 335. 168
Floyd *v.* Barker (1608), 12 Co.R. 24 52
Fray *v.* Blackburn (1863), 3 B. and S. 576 50
Frome United Breweries *v.* Bath Justices (1926), A.C. 586; 95 L.J., K.B. 730; 135 L.T. 482 63
Fuller *v.* County of Colfax (1882), 14 Fed. 177 186

Gibson *v.* Reach (1924), 1 K.B. 294; 93 L.J., K.B. 194; 130 L.T. 411; 40 T.L.R. 73 216
Glyn *v.* Weston Feature Film Comp. (1916), 1 Ch. 261; 85 L.J., Ch. 261; 114 L.T. 354; 32 T.L.R. 235 241
Gray *v.* Matthias (1800), 5 Ves. 285 (*a*); 5 R.R. 48 . . . 239
Gresham Life Ass. Soc., *in re* (1872), L.R. 8; Ch. 446; 42 L.J., Ch. 183; 28 L.T. 150; 21 W.R. 186 179

H. *v.* H., *in re* (1909), 2 Ch. 260; 78 L.J., Ch. 745 . . . 21
Haigh *v.* Haigh (1861), 31 L.J., Ch. 420; 8 Jur. (N.S.) 983; 5 L.T. 507 67
Hall *v.* Manchester Corp. (1915), 84 L.J., Ch. 732; 113 L.T. 465; 13 L.G.R. 1105; 31 T.L.R. 416 87
Hammond *v.* Howell (1678), 2 Mod. 218 51
Hancock *v.* Somes (1859), 1 El. *v.* El. 795; 28 L.J., M.C. 196; 7 W.R. 422; 8 Cox C.C. 172 8
Hartley *v.* Rice (1808), 10 East. 22; 10 R.R. 228 . . . 239
Hepworth *v.* Ryott (1920), 1 Ch. 1; 89 L.J., Ch. 69; 122 L.T. 135; 36 T.L.R. 10 239
Hermann *v.* Charlesworth (1905), 2 K.B. 123; 74 L.J., K.B. 620; 93 L.T. 284; 21 T.L.R. 368 239
Houlder Bros. *v.* Gibbs (1925), Ch. 575; 94 L.J., Ch. 312; 133 L.T. 322; 41 T.L.R. 487 235
Hutton *v.* Attorney-General (1927), 1 Ch. p. 427; 96 L.J., Ch. 285; 43 T.L.R. 166 77

PAGE

Institute of Patents Agents *v.* Lockwood (1894), A.C. 347; 63 L.J., P.C. 74; 6 R. 219; 71 L.T. 205 177

Jager *v.* Tolme (1916), 1 K.B. 939; 85 L.J., K.B. 1116; 114 L.T. 647; 32 T.L.R. 291 189
Jeffrey *v.* Bamford (1921), 2 K.B. 351; 90 L.J., K.B. 664; 125 L.T. 348; 37 T.L.R. 601 239

Keighley's Case, 10 Co. Rep. 139 (*a*) 239

Labouchere *v.* Earl of Wharncliffe (1879), 13 C.D. 346; 41 L.T. 638; 28 W.R. 367 169
La Mert, *ex parte* (1863), 4 B. and S. 582; 33 L.J., Q.B. 69; 12 W.R. 201 176
Lapointe *v.* L'Association de Bienfaisance (1906), A.C. 535; 75 L.J., P.C. 73; 95 L.T. 479 171
Law *v.* Chartered Institute of Patent Agents (1919), 2 Ch. 276; 88 L.J., Ch. 319; 121 L.T. 50; 36 R.P.C. 163; 35 T.L.R. 385 . 174
Leavett *v.* Clark (1915), 3 K.B. 9; 84 L.J., K.B. 2157; 113 L.T. 424; 13 L.G.R. 894; 31 T.L.R. 424 216
Leconfield *v.* Thornely (1926), A.C. 10 45
Lee *v.* Bude and Torrington Railway Comp. (1871), L.R. 6 C.P., at p. 582; 40 L.J., C.P. 285; 24 L.T. 827; 19 W.R. 954 . . . 61
Leeds Corporation *v.* Ryder (1907), A.C. 420; 76 L.J., K.B. 1032; 97 L.T. 261; 23 T.L.R. 721 64
Leeson *v.* Gen. Council of Medical Education (1889), 43 Ch.D. 366; 59 L.J., Ch. 233; 61 L.T. 849 . . . 168, 172, 179, 184
Lloyd's (Dr.) Case (1925), *The Times*, Nov. 30, 1925 . . . 311
Local Government Board, *in re* (1885), 16 L.R.Ir. 150 . . 9, 42
Local Government Board *v.* Arlidge (1915), A.C. 120; 84 L.J., K.B. 72; 111 L.T. 905; 12 L.G.R. 1109; 30 T.L.R. 672 53, 143, 233, 290
London, City of, *v.* Wood, 12 Mod., at p. 687 61
Lowe *v.* Peers (1768), 4 Burr. 2225 239

Macduff, *in re* (1896), 2 Ch. 451; 65 L.J., Ch. 700; 74 L.T. 706; 45 W.R. 154 240
Morgan, *in re* (1910), 26 T.L.R. 398 239
Moris *v.* Saxelby (1916), 1 A.C. 688; 85 L.J., Ch. 210; 114 L.T. 618; 32 T.L.R. 297 239
Morley *v.* Rennoldson (1895), 1 Ch. 449; 64 L.J., Ch. 485; 12 R. 158; 72 L.T. 308; 43 W.R. 518 239

Newry and Enniskillen Railway Co. *v.* Ulster Railway (1856), 8 De G. M. and G. 487; 2 Jur. (N.S.), 936; 4 W.R. 761 67
Nordenfeldt *v.* Maxim-Nordenfeldt Gun Co. (1894), A.C. 535; 63 L.J., Ch. 908; 11 R. 1; 71 L.T. 489 . . . 239, 240
North Western Salt Co. *v.* Electrolytic Alkali Co. (1914), A.C. 461; 83 L.J., K.B. 530; 110 L.T. 852; 30 T.L.R. 313 . . . 239

O'Connor *v.* Ralston (1920), 3 K.B. 451; 36 T.L.R. 768 . . 239
Onions *v.* Naish (1819), 7 Price 203 60

Parsons *v.* Lakenheath School Board (1889), 58 L.J., Q.B. 371 . 148
People *v.* Mayor, 5 Barb. 43 10

PAGE

Philips *v.* Bury, 2 Term. Rep. 346 69
Phillips *v.* Probyn (1899), 1 Ch. 811; 68 L.J., Ch. 401; 80 L.T. 513 239
Pickering *v.* James (1873), L R. 8 C.P. 489; 42 L J., C.P. 217; 29 L.T. 210; 21 W.R. 786 58
Post *v.* Marsh (1880), 16 Ch.D. 395; 50 L.J , Ch. 287; 43 L T. 628; 29 W R. 198 239
Pritchard *v.* Mayor of Bangor (1888), 13 App. Cas. 241; 57 L J., Q.B. 313; 58 L.T. 502; 37 W R. 103 58

Ramadge *v.* Ryan (1832), 9 Bing. 333; 2 L.J., C.P. 7; 2 M. and Scott. 421 60
Raudenbusch's Appeal, 120 Pa. 342; 14 Atl. 150 71
Rex. *v.* Bath Compensation Authority (1925), 94 L.J., K.B. 613; [1925], 1 K.B. 685; 23 L.G.B. 405; 133 L.T. 116; 41 T.L R. 346 61, 64
R. *v.* Boleter (1864), 33 L.J., M.C. 101 232
R. *v.* Bowman (1898), 1 Q.B. 663; 67 L.J., Q.B. 463; 78 L.T. 230; 62 J P. 374 234
R. *v.* Brighton Corporation (1916), 85 L.J., K.B. 1552; 114 L.T. 800; 14 L.G.R. 776; 32 T L R. 239 . . . . . 200, 234
R. *v.* Collins (1876), 2 Q.B.D. 30; 46 L.J., Q.B. 257; 36 L.T. 192; 24 W.R. 732 19
R. *v* Comptroller-General of Patents (1899), 1 Q.B. 909; 68 L.J., Q.B. 568; 80 L.T. 777; 47 W.R. 567 153
R. *v.* Denbighshire Justices, 1 B. and Ad 616; 9 L J. (O.S.), M.C. 109 88
R. *v.* Drummond (1903), 88 L.T. 833 9
R. *v.* Farnborough Urban District Council (1920), 1 K.B. 234. . 234
R. *v.* Hain (1896), 12 T.L.R. 323 59
R. *v.* Housing Appeal Tribunal (1920), 3 K.B. 334; 89 L.J., K.B. 1133; 123 L.T. 673; 18 L.G.R. 571; 36 T.L.R. 713 . . 148
R. *v.* Howard (1902), 2 K B. 363; 71 L.J., K.B. 754; 86 L.T. 839; 51 W.R 21; 60 J.P. 579 65
R. *v.* Justices of Sunderland (1901), 2 K.B. 357; 70 L J., K.B. 946; 85 L.T. 183; 65 J.P. 599 60
R. *v.* Lediard (1751), Sayer's Rep., p. 6 8
R. *v.* Lisnaskea Poor Law Guardians (1918), 2 Ir.R. 258—K.B.D. .7, 110
R. *v.* Local Government Board, *ex parte* Arlidge (1914), 1 K.B. 160; 83 L.J., K.B. 86 144
R. *v.* Local Government Board (1911), 2 Ir. 331—K.B.D. . 101, 149
R. (Dixon) *v.* Local Government Board (1878), 2 L.R.Ir. 316 . . 7
R. *v.* Local Government Board (1918), 2 Ir.R. 131—K.B.D. . . 235
R. *v.* Local Government Board (1882), 10 Q.B.D. 309; 52 L.J., M.C. 4; 48 L.T. 181 140
R. *v.* Bishop of London (1812), 15 East, 117; 13 R.R. 409 . . 175
R. (Wexford C.C.) *v.* Local Government Board (1902), 2 I.R. 349 . 86
R. *v.* London County Council (1918), 1 K.B 68; 87 L.J., K.B. 303; 118 L.T. 107; 82 J.P. 20; 34 T.L.R. 21 231
R. *v.* London County Council, *ex parte* Akkersdyk (1892), 1 Q.B. 190; 61 L.J., M.C. 75; 66 L.T. 168; 40 W.R. 285; 56 J.P. 8 . 63
R. *v.* London County Council, *ex parte* Commercial Gas Comp. (1895), 11 T.L.R. 337 . . . . . 7, 78
R. *v.* London County Council, *re* the Empire Theatre (1894), 71 L.T. 638 61
R. *v.* Manchester Justices (1899), 1 Q.B. 571; 68 L.J., Q.B. 358; 80 L.T. 531; 47 W.R. 410 8

PAGE

R. *v* Marshall (1925), 18 Cr. App. R. 164 197
R. *v.* Marsham (1883), 50 L.T. 142 ; 32 W R. 157 ; 48 J.P. 308 . 9
R. *v.* Newcastle-on-Tyne Corporation (1889), 60 L.T. 963 ; 53 J.P. 788 234
R. (Porter) *v.* Omagh Union (Guardians of) (1890), 26 L.R.Ir. 619 . 9
R. *v.* Porter (1910), 1 K B. 369 ; 79 L.J., K.B. 241 ; 102 L.T. 255 ; 74 J P. 159 ; 26 T L.R. 200 239
R. *v.* Rand (1866), L.R., 1 Q.B. 230 ; 35 L.J., M.C. 157 59, 60
R. *v.* Roberts, *ex parte* Scurr (1924), 2 K.B. 695 ; 94 L.J., K.B. 1 ; 88 J.P. 174 ; 40 T L.R. 769 286
R. *v.* Rosser (1836), 7 Car. and P. 648 80
R. *v.* Sharman (1898), 1 Q.B. 578 ; 67 L.J., Q.B. 460 ; 78 L.T. 320 ; 46 W.R. 367 ; 62 J.P. 296 8
R. *v.* Skinner, Lofft's Rep. 55 51
R. *v.* Smith (1915), Cr. App. R. 164 197
R. *v.* Sunderland Justices (1901), 2 K.B. 357 ; 70 L.J., K.B. 946 ; 85 L.T. 183 ; 65 J.P. 599 65
R. *v.* Sylvester (1862), 31 L.J., M.C. 93 ; 8 Jur. (N.S.) 484 ; 5 L.T. 794 231
R. *v.* Waterman's Comp. (1897), 1 Q.B. 659 10
R. *v.* Whitaker (1914), 3 K B. 1283 ; 84 L.J., K.B. 225 ; 112 L.T. 41 ; 30 T.L.R. 627 ; 58 S.J. 717 64
Rigby *v.* Connol (1880), 14 Ch.D. 482 ; 49 L.J., Ch 328 ; 42 L.T. 139 ; 28 W.R. 650 167
Roberts *v* Hopwood (1925), A.C. 578 ; 94 L J., K.B. 542 ; 133 L.T. 289 ; 41 T.L R. 436 286
Rooke's Case, 5 Co. Rep. 99 (*b*) 229
Royal Aquarium *v.* Parkinson (1892), 1 Q B. 431 ; 61 L.J., Q.B. 409 ; 66 L.T. 513 ; 40 W.R. 450 . . . . . 50, 57

Sandbrook, *in re* (1912), 2 Ch 471 ; 81 L J., Ch. 800 ; 107 L.T. 148 ; 56 S.J. 721 239
Scott *v.* Scott (1913), A.C. 417 ; 82 L J.P. 74 ; 109 L.T. 1 ; 57 S.J. 498 ; 29 T.L.R. 520 . . . . . 20, 76
Scott *v.* Stansfield (1868), L.R. 3 Ex. 220 ; 37 L.J., Ex. 155 ; 18 L.T. 572 ; 16 W.R. 911 50
Sharp *v.* Wakefield (1891), A.C. 173 ; 60 L J., M.C. 73 ; 64 L.T. 180 ; 39 W.R. 551 ; 55 J.P. 197 . . . . . 209, 229, 232
Slingsby *v.* Bradford (1906), W.N. 51 239
Society of Accountants in Edinburgh *v.* Lord Advocate (1924), W.C. and Ins. Rep 285 . . . . . 7, 88
Solicitor (No. 2), *in re* (1924), 93 L.J , K.B. 761 ; 131 L.T. 155 ; 68 S.J. 756 ; 40 T.L R 420 181
Sterry *v.* Clifton (1850), 9 C.B 110 ; 19 L.J., C.P. 237 ; 14 Jur. 312. 239
Sutton *v.* Sutton (1927), *The Times*, March 8, 1927 268
Sydney, Municipal Council of *v.* Campbell (1925), A.C. 338 ; 94 L.J., P.C. 65 ; 133 L.T. 63 234

Ex parte Taunton (1833), 1 D.P.C. 54 8
Thompson *v.* Thomas (1891), 27 L.R.Ir. 457 239
Tozer *v.* Child (1857), 7 El. and Bl. 377 ; 26 L.J., Q.B. 151 ; 3 Jur. (N.S.) 774 ; 5 W.R. 287 58
Truax *v.* Corrigan (1921), 257 U.S. 312 269

Van Gelder's Patent, *in re* (1888), 6 R.P.C. 22 153

PAGE

Walsh *v.* Gladstone (1842), 13 Sim. 261; 13 L.J., Ch. 52; 7 Jur. 1143 239
Walsh *v.* Walsh (1869), I.R. 4 Eq. 396 240
Weinberger *v.* Inglis (1919), A.C. 606; 88 L J., Ch 287; 121 L.T. 65; 35 T.L.R. 399; 63 S.J 461 178
Wells *v.* Foster (1841), 8 M and W., at p. 151; 10 L.J., Ex. 218; 5 Jur. 466 239
White *v.* St. Marylebone Borough Council (1915), 3 K.B. 249; 84 L.J., K.B. 2142; 113 L T. 447 216
Wilson *v.* Esquimalt Nanaimo Railway Comp. (1922), 1 A.C. 202; 91 L.J., P.C. 21; 126 L.T. 451 150
Wood *v.* Wood (1874), L.R. 9 Ex. 190; 30 L.T. 815; 22 W.R. 709 169, 170

Young *v.* Ladies' Imperial Club (1920), 2 K.B. 523; 89 L.J., K.B. 563; 123 L.T. 191; 36 T.L.R. 392 . . . . . 170, 311

THE END

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